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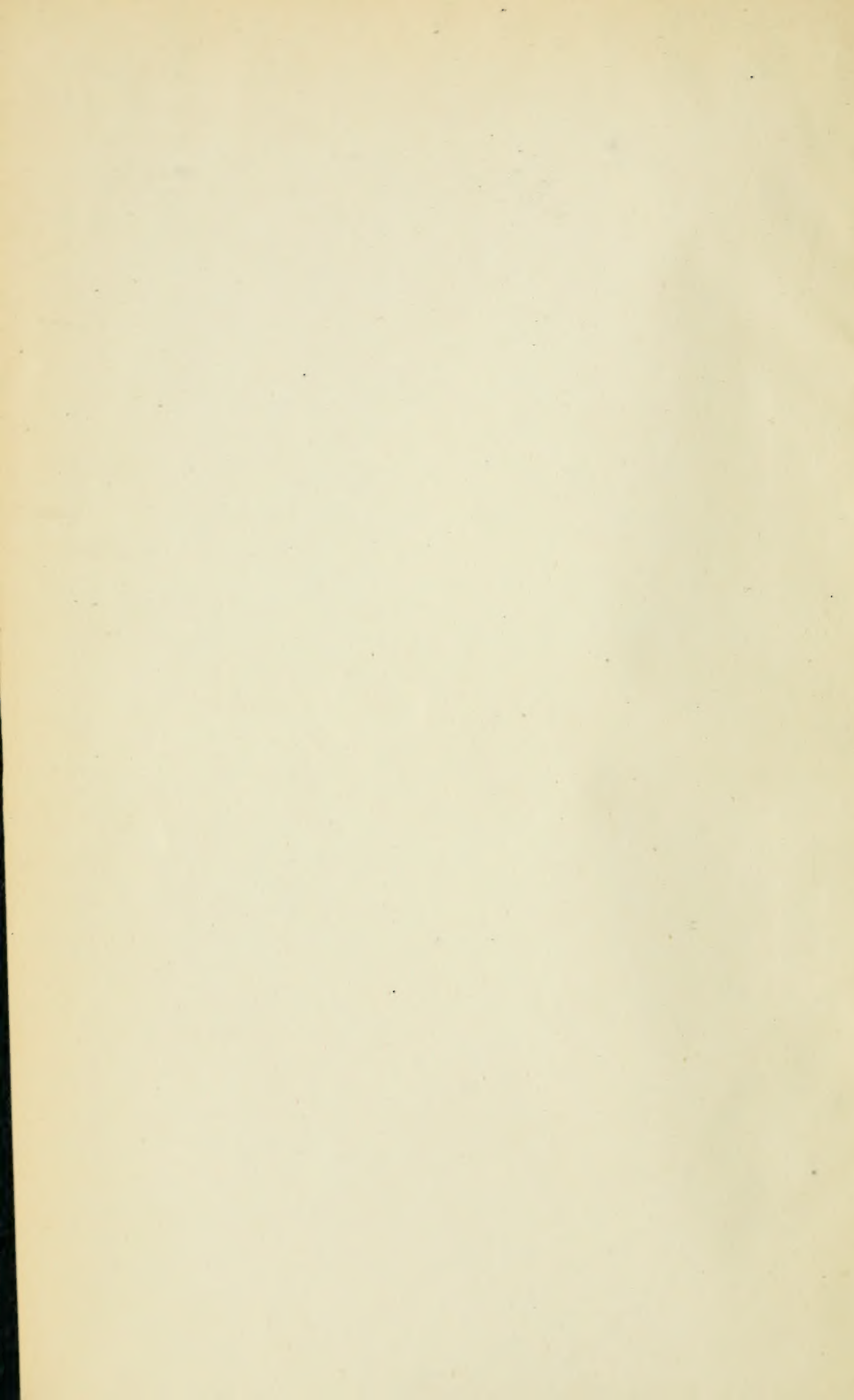


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THE INSTITUTES OF LAW

Πᾶς ἐστὶ νόμος εὐρημα μὲν καὶ δῶρον Θεῶν.

—DEMOSTHENES.

“Das eine Gesetzbuch des Rechts ist die Göttliche Weltordnung.”

—KRAUSE.

“All human laws are, properly speaking, only declaratory.”

—BURKE.

Μόνον γὰρ μόνιμον τὸ κατ' ἀξίαν ἴσον, καὶ τὸ ἔχειν τὰ αὐτῶν.

—ARISTOTLE.

“The unfettered multitude is not dearer to me than the unfettered king.”

—CHANNING.



Law  
L872i

# THE INSTITUTES OF LAW

A TREATISE OF THE

## PRINCIPLES OF JURISPRUDENCE

AS DETERMINED BY

### N A T U R E

BY


JAMES LORIMER

ADVOCATE, REGIUS PROFESSOR OF PUBLIC LAW AND OF THE LAW OF NATURE AND  
NATIONS IN THE UNIVERSITY OF EDINBURGH, MEMBER OF THE INSTITUTE  
OF INTERNATIONAL LAW, AND CORRESPONDING MEMBER OF THE  
ACADEMY OF JURISPRUDENCE OF MADRID, ETC.

SECOND EDITION, REVISED AND ENLARGED

WILLIAM BLACKWOOD AND SONS  
EDINBURGH AND LONDON  
MDCCCLXXX

49294  
7/12/00



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TO THE  
DEAN AND FACULTY OF ADVOCATES IN SCOTLAND,  
AND THROUGH THEM TO THE  
WIDE FRATERNITY OF JURISTS IN OTHER LANDS,  
THIS ATTEMPT TO  
VINDICATE THE NECESSARY CHARACTER OF JURISPRUDENCE  
BY EXHIBITING IT AS A BRANCH OF THE  
SCIENCE OF NATURE,  
IS RESPECTFULLY DEDICATED  
BY THEIR LOYAL AND AFFECTIONATE BROTHER,  
THE AUTHOR.





## PREFACE TO THE SECOND EDITION.

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It has often been a subject of regret to me that the speculative tendencies of my countrymen were not directed more definitely to the life of man in Society and in the State. Had those great thinkers who have rendered the Scottish School of Philosophy illustrious set before them the task of placing Politics and Jurisprudence on a scientific basis, Political Economy might, long ago, have ceased to be the only practical science for which the world was indebted to a Scotch professor.

This task I recognized as more immediately incumbent on the occupant of the Chair which I had been called to fill; and the desire of contributing, however humbly, to its accomplishment, has determined the character both of my oral teaching and of this Text-book.

Although the present is not a speculative age, in some respects it has, unquestionably, been favourable to the work which I had in hand. That mitigation of dogmatism which Mr Herbert Spencer has wittily described as the "theological thaw," by enabling us to distinguish between the temporary, local, and relative, and the permanent, universal, and absolute elements in religious systems, has given to the history of

religious opinion a value for secular purposes which it did not formerly possess. I have, consequently, not hesitated to avail myself of the rich materials with which oriental scholarship has now furnished us, in order to bring into prominence the unvarying ethical element which underlies all variations of dogma and of ritual. This ethical element—clearer, from the first, in the higher than in the lower races of mankind—becomes clearer and more definite as the conscious life of each race evolves itself, and as its accordance with subjective and objective revelations of the scheme of the universe is perceived. As faith becomes more reasonable, reason becomes more faithful, and ultimately we must hope that the great problem of Scholasticism will be solved by their culmination in a joint result. It is to the rule of life thus gradually recognized, that I have given the name of Natural Law, and, in the concrete realization of which I have sought the line along which all true Positive Legislation must necessarily travel.

Conformity or non-conformity with Natural Law, in this sense, is, to my mind, the only conceivable measure of the value of social activity that is either permanent or universal; and it is on this ground that I have adhered to the academical method which relied on it, in place of adopting the method of measuring actions by results, on which the modern science of Sociology depends. Before we can measure by results, the results must be measured; and my difficulty with reference to utility, when proposed as the ultimate measure, as I have elsewhere explained, is—*quis custodit custodem?* Utility, in its turn, must be measured by some end or object which it seeks, and, till we reach a teleological

measure that transcends individual or national tastes and sentiments, Pilate's question regarding truth will apply to it. Short of nature there is no science of ends; and to ascribe either utility or inutility to means irrespective of ends, is mere baseless dogmatism. If the results which we declare to be useful be identified with the objects of nature's legislation, the whole aspect of the affair, of course, is changed. Our results become ends, and not only they, but all the means that contribute to their attainment may safely be labelled as useful. But, in that case, Sociology presupposes scientific jurisprudence.

Utilitarianism, as anything more than a phase of the inductive method, scarcely crossed the Border, and never crossed the Channel at all. But so firm was the hold which it took on England in the last generation, that to many of my elderly and middle-aged readers the possibility of its "utility" being called in question has probably never presented itself. On the other hand, it is rare, I believe, even in England, to find a Benthamite *pur sang* who is under forty. I do not think one has turned up amongst my students for the last ten years, though many of them have been graduates of the English universities; and before another decade elapses, the preference for the older and grander traditions which Grotius inherited from Socrates, "the great lawyer of antiquity," as Lord Mansfield called him, through the Stoics and the Roman Jurists, over those which Bentham transmitted to Austin, will, I hope, be as universal and unequivocal as that for classical and mediæval architecture over the architecture of the Georgian era has already become.

This second edition does not differ essentially from the first; but in many directions, I trust, it has been rendered clearer in statement and more consistent in argument, in consequence of the sincere though generous criticisms of my colleagues of the Institute of International Law, and the daily friction of the lecture-room, where, for the last seven years, the first edition has been used as a textbook by the exceptionally advanced and cultivated class of students whom it has been my privilege to address. As I have been careful to avail myself of suggestions and indications of opinion from both sources, whenever they appeared to me to be of value, the work in its present form may be regarded as the result of a process of development, rather than of a single effort of composition. To some extent it has the character of a bill that has not only been read a second time, but has passed through committee; and for this reason I present it to the profession and to the public with fewer misgivings than I felt in the case of its predecessor. For many valuable suggestions, and criticisms of a minuter kind, as well as for the revision of the sheets as they passed through the press—an aid which my imperfect sight has rendered more indispensable than formerly—I am indebted to my friend Mr John Kirkpatrick. As Mr Kirkpatrick is a graduate of three universities—Cambridge, Heidelberg, and Edinburgh—and has had much literary experience, both as a writer and an editor, his kind interposition on this occasion has been a boon to my readers as well as a favour to me.

With all these advantages I must not hope that I have succeeded in making this work even a perfect expression of what



was, no doubt, an imperfect conception. But I have been mindful that, as all is not gold that glitters, so all is not deep that is dark; and I can honestly say that I have left no intentional “secrets” for my readers to puzzle out. The English language is capable of conveying clearly whatever we have got clearly into our heads, and the apology which Coleridge offered to those who accused him of obscurity—*intelligibilia haud intellectum adfero*—is one which must be very sparingly used. The book is intended not for jurists only, but for cultivated persons generally, and if it is not generally intelligible, the fault is mine.



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# THE INSTITUTES OF LAW.

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## INTRODUCTION.

### PRELIMINARY DEFINITIONS AND DIVISIONS.

I. **D**EFINITIONS and divisions are possible only after the subject of them is known. They must consequently be the goal, rather than the starting-point, of scientific inquiry. But, on the other hand, inasmuch as the sight of the butt is necessary to the archer, we shall do well to place before us at the outset, as clearly as we can, the object at which we aim. This proceeding is the more necessary in consequence of the want, in our own system of legal instruction, of any preliminary course corresponding to what, in Continental Universities, is called Encyclopædia, in which the skeleton, so to speak, of the science upon which the student is about to enter is exhibited to him. It has been said with great truth that the philosophy of law, on the ground that it stands in a general relation to each of the special branches of the science of law, is itself an encyclopædia, but that it is a philosophical encyclopædia.<sup>1</sup> Such an encyclopædia I hope to

<sup>1</sup> Michelet, *Naturrecht*, pp. 17 and 18.

furnish in the sequel of this work; but it is a dogmatic sketch alone which I can attempt at the outset.

With this limited aim, then, the branch of science with the study of which we shall be here engaged, may be described as having for its object the discovery of that law which, by the nature of all rational creatures, and independently of their volition, determines their relations to each other and to surrounding existences, in so far as this law is mediately or immediately revealed to human reason and realizable by human will, under the conditions of human existence in time and space. The validity of the law of nature, it is true, is not, or at any rate cannot be conceived by us to be, limited to humanity, or to humanity under the conditions of time and space. Culverwell accordingly defines it as "that law which is intrinsical and essential to a rational creature;"<sup>1</sup> and Hegel, regarding it as the divine conception of Kosmos in human relations, by which the limited or relative will of the creature is harmonized with the unlimited or absolute will of the Creator, speaks of it as "the reign of liberty realized." Seen from this latter point of view, we might define it as the law which determines the conditions of perfect human co-existence, or, of progress towards the realization of such co-existence. It is in this light that it specially concerns the jurist, as distinguished from the metaphysician and the moral philosopher; for it is when thus regarded that he begins to see in it the permanent element of positive law.

The Kosmic character of existence, or, in other words, its absolute rectitude, as we shall see hereafter, is an assumption

<sup>1</sup> *Light of Nature*, p. 57.



which is psychologically inevitable. Relative will cannot contend with absolute will, even in thought. In its origin, law, like existence, is thus involuntary and inexplicable. It is an objective phenomenon which consciousness presents to us, not from without but from within: a conception which is imposed on our cognitive faculties *a priori*: a postulate necessitated by the fact that we are. Law thus comes out of mystery, just as it goes out into mystery. The consciousness which brings it within the sphere of finite vision is as dark as the consciousness which carries it back into the infinite; for the one marks its passage into, and the other its passage out of, the conditions of time and space. Over its coming and its going we have no more control than over a ray of sunshine. But, even at the risk of misapprehension, I must, for the present, refrain from pursuing the subject further in this aspect; and in addressing myself to professional students, and having practical rather than theoretical objects in view, I shall endeavour throughout to avoid all forms, both of thought and expression, which may not fairly be assumed to be familiar to cultivated persons generally in this country.

In designating this subject the law of nature, it is obvious that, whilst the term law is employed in the general sense of Kosmical arrangement, we use the term nature in a more restricted sense than that in which it is often identified with created existence. The law of nature, in the jural sense, is not the whole scheme of the universe, but the branch of that scheme which has reference to human relations. It does not deal with the inevitable relations in which man stands

to the external world, whether animate or inanimate. The laws of generation, of growth and decay, of digestion, assimilation, respiration, and the like, lie beyond its sphere, just as much as the laws of space and number, or the laws of thought. These are laws which wholly shut out the element of human volition. The natural laws by which human relations are governed, on the other hand—the laws of ethics, politics, and jurisprudence—are, in a limited sense, laws of freedom. They are laws the violation of which is physically possible, not only to the individual, but to the state, and even to the community of nations. Whether they can be permanently and ultimately violated even in this world, is a question which belongs to philosophy and theology rather than to jurisprudence. But for the immediate purposes of his science, the jurist must accept the task of demonstrating the inevitable character of these laws. He must show that, though natural laws, in the sense which he attaches to them, may certainly be broken, for a time at least—nay, though it be inconceivable that imperfect beings should ever observe them perfectly—they are essentially self-avenging. To use a happy German distinction, which I fear is hardly translatable, they are thus *Soll-Gesetze*, though not *Muss-Gesetze*<sup>1</sup> ('ought-laws, not must-laws'). Their consequences are as inevitable as their character is unchangeable; it is their fulfilment or non-fulfilment alone that is dependent on human volition. As natural laws, it belongs to their conception that the rewards attached to their fulfilment, and the punishments which attach to their violation, depend as little on the wills of those who fulfil them

<sup>1</sup> Krause's *Rechts-Philosophie*, p. 36.

or violate them as the rising and the setting of the sun. It is this character, as we shall presently see, which distinguishes natural laws from mere human enactments, which may or may not be in conformity with them, and which, consequently, may or may not be permanently set at naught.

As illustrating the difficulty of defining natural law in the jural sense, so as to keep it apart from theology on the one hand and physiology on the other, I may mention the modes in which law as a whole has been divided by two of the greatest minds that ever were brought to bear on its elucidation,—St Thomas Aquinas, and our own not less saintly Hooker. The first, which was generally followed by the theologians and schoolmen, was this:—

1. Eternal Law: that of the Divine and general government of the universe. Of this law Culverwell has finely said, that “it was in a manner *incarnated* in the law of nature.”<sup>1</sup>

2. Natural Law:<sup>2</sup> that of finite creatures endowed with reason.

3. Human Law: that which has reference to human relations.

4. Divine Law: the order of salvation specially provided for man.<sup>3</sup>

The second (Hooker’s scheme) was this:—

1. Law which God from the beginning set for Himself.
2. Law which natural agents observe.
3. Law which the angels obey.

<sup>1</sup> *Light of Nature*, p. 50.

<sup>2</sup> *Lex naturalis nihil aliud est, quam participatio legis æternæ in rationali creatura.*

<sup>3</sup> *Summa Theologiæ, Prima Secundæ, Questio xci.*

#### 4. Law which directs man to the imitation of God.<sup>1</sup>

Without entering on the manifest objections which might be stated to each of these schemes, many of which were obviated in the rich and varied discussions to which they gave rise, we may repeat, in a word, that our conception of natural law is—the law for the general government of the universe, only in so far as it has reference to the relations of men, or is “incarnated” in human society.

II. Natural law, when treated as a science, is often called the philosophy of law.<sup>2</sup> But, inasmuch as nature is a more definite conception than philosophy, the former epithet is preferable; and for this reason, probably, recent writers seem mostly to have reverted to it. I have adopted the terms “Institutes of Law,” and “Principles of Jurisprudence as determined by Nature,” in order to indicate the fundamental relation in which the subject stands to all the departments of positive law.

III. The science of the law of nature, or the philosophy of law, professes to furnish us with the doctrines of natural law in the abstract. The law of nature is thus the subject with which this science is conversant; but it is no more identical with the science than the subject of any other branch of study is identical with the study itself—than, *c.g.*, the laws of the vegetable or animal creation, with the

<sup>1</sup> *Ecclesiastical Polity*, vi. p. 72.

<sup>2</sup> See the list of works at the end of the first volume of Ahrens's *Cours de Droit Naturel*, p. 325. Michelet says that it was called *Naturrecht* by the jurists, and *Rechtsphilosophie* by the later philosophers, p. 1. The names are now synonymous, and it is taught both in the faculties of philosophy and of law, both by philosophers and jurists.

sciences of botany, zoology, anatomy, or physiology. There are laws of nature which govern the growth and decay of plants and animals, whether we know and obey, or ignore and violate them. And just in the same way there is a law of nature which governs the human life of man, whether we discover it and follow it, or blindly and ignorantly set it at defiance. "It is," says Ahrens, "with moral order as with physical order. The law of attraction existed and governed the relations of natural existences before it was discovered by Newton and determined by science." In like manner Max Müller tells us how long it was before the Greeks arrived at a complete nomenclature for the parts of speech. But there were parts of speech before they were discovered by the Greeks, and, strange as it may seem to us, they were known to Sanscrit literature. What is true of the laws of life and of language, is not less obviously true of the laws of thought, or of their applications. Logic may have been discovered by Aristotle, but it was both used and abused in the Garden of Eden. To suppose, then, that because positive laws existed before the natural laws, of which they were imperfect, local, and temporary realizations, had been scientifically evolved, or systematically enunciated, positive law therefore preceded natural law in point of time—as is done by those who identify natural law with the laws which they imagine to have existed in the imaginary state of nature—is just as great an absurdity as to suppose that because houses were built up and tumbled down before the law of attraction was discovered, they did not stand or fall in accordance with that law; or that, because men spoke before they knew the parts of speech, they did not



make use of nouns and verbs every time they gave utterance to articulate sounds. And as the law of nature existed before it was scientifically discovered, it existed equally before it was divinely revealed. "It was long extant," says Culverwell, "before Moses was born; long before Aaron rung his golden bells; before there was a prophet or a judge in Israel."<sup>1</sup>

IV. The science of jurisprudence differs from the science of natural law, and from the philosophy of law, in this respect, that, in addition to the discovery of the doctrines of natural law and their general and permanent action, it includes their local and temporal realization—*i.e.*, positive law, properly so called,<sup>2</sup> in all its branches. Jurisprudence thus embraces legislation, whether the subjects with which it deals be political, economical, or social, national or international,

<sup>1</sup> *Ut sup.* p. 68.

<sup>2</sup> I find that the expression "positive law," in the sense in which I here use it—viz., of natural law realized in time and place—has occasioned confusion in the minds of some of my readers, which, even at this early stage of our discussions, it may be desirable to remove. The sense attached to positive law in England, I am told, is "law as it is"—that is to say, law enacted by a recognized authority, whether in conformity with, or in opposition to, natural law. Law which sets the principles of human nature and the facts of society at defiance is, in this sense, positive law just as much as law which recognizes them;—sense and nonsense, if formally enacted, stand on a footing of perfect equality. Now the modicum of truth which this conception contains is sufficiently taken into account when we recognize the necessary imperfection of all human enactments. It is quite true that "law as it is" can never quite coincide with "law as it ought to be," or, in other words, can never quite realize natural law in time and place, and consequently, that if we were to adhere strictly to our definition, we could never have any positive law at all. But this does not hinder the "law which is" from being more or less positive, in proportion to the extent to which it approaches to, or recedes from, its own ideal; nor does it prevent this ideal from determining the only sense in which positive law can be formally or scientifically understood. The true equivalent for "law as it is" is thus not "positive law," but "enacted law," which, without losing its character, may set both the laws and the facts of nature at defiance.—*Infra*, p. 10.

civil or ecclesiastical, public or private, general or particular, as well as jurisdiction and execution; whilst the sphere of an academical Faculty of Law extends to the study of the whole human relations, whether these relations be necessary and permanent, or accidental and transitory.

V. Positive law may be regarded either as a science or as an art. The science is the result of a process of analysis—the art is that of a process of synthesis resting on the previous analysis; and inasmuch as the existence of the synthesis without the analysis is impossible, there can be no art of positive law without a science of positive law.

(A) The science of positive law has for its object the discovery (*Erkenntniss*) of the law of nature in special circumstances, and with reference to special relations.

(B) The art of positive law has for its objects the recognition (*Anerkennung*) of the law of nature by special enactments, and its vindication in special circumstances and relations.

Law as an art assumes three functions: (a) Legislation, (b) Jurisdiction, (c) Execution, which in the earlier stages of its development are not sharply distinguished from each other.

Apart from their realization in positive laws, the rules of natural law are merely hypothetical and contingent, depending for their concrete forms on the answers which may be given by observation and experience to questions of fact which they do not profess to solve. Natural law thus forms the major premiss of the syllogism of which the legislative enactment, or the judicial sentence, is the conclusion; or, to use a professional illustration, it draws the issue to which positive law returns the verdict.

Every sound legislative enactment thus involves the previous decision of a question of natural law ; and every sound judicial sentence involves the acceptance of that decision. The three moments of jurisprudence are thus—natural law, human enactment, and (in case of controversy) judicial decision.

VI. In consequence of the imperfection which clings to humanity, human enactments never attain to the full character of positive laws. But they possess the character of positive laws, more or less, in proportion to the extent to which they are, or are not, interpretations and realizations of the law of nature. Enactments, in so far as they fail to realize the law of nature, must be errors, and may be crimes. Even where there is no want of good intention on the part of the legislature, laws formally enacted may fall short of the character of positive laws from three causes :—

(a) From an erroneous conception of the law of nature to be realized.

(b) From an erroneous appreciation of the special circumstances in which the law of nature is to be realized, and, as a necessary consequence, of the provisions by which the law of nature is realizable.

(c) From changes in the special circumstances of the community, rendering inoperative those provisions by which the law of nature was formerly realized.

But, inasmuch as men are liable to err, not only in interpreting and realizing the law of nature anew, but in judging of the manner in which it has already been interpreted and realized, great caution ought to be exercised in condemning and altering enacted laws. Moreover, as all human enactments

must embody some element of error, it does not follow that an existing law should be altered the moment that the fact of its divergence from natural law, or even the direction in which it diverges, has been discovered. In the latter case, the manner in which it must ultimately be altered, or developed, will, in a general way, be known; but the means of its amendment—*i.e.*, the special form which the new enactment ought to assume—may still be undetermined.

VII. Judicial sentences may honestly fail to realize the law of nature in the individual case, from three causes:—

(*a*) From failure on the part of the judge to discover, or to understand, the enactment in which the law of nature has been more or less perfectly embodied in the wider sphere of legislation.

(*b*) From failure on the part of the litigant, or his representative, to present the facts of the individual case, or to present them intelligibly, to the judge.

(*c*) From failure on the part of the judge to apprehend the facts of the individual case when intelligibly presented to him.

VIII. The law of nature may further be negatively defined by distinguishing it from the following subjects with which it has often been confounded:—

(*a*) From a primitive code, or body, of consuetudinary law, which is supposed to have prevailed in an imaginary “state of nature.” Such a code, had it ever existed, would, like all other codes, have been a body of positive law; and, as the work of an age destitute of experience, and of minds destitute of culture, it must have been a very imperfect one.

(*b*) From a “primitive contract” by which men are supposed

to have agreed to observe the principles of justice in their dealings with each other,—a contract into which they could not have entered until these principles were known to them, and the assumption of which consequently involves a *petitio principii*.

(c) From a preliminary department special to the law of nations, to which natural law stands, as we shall see, scientifically in the same relation as to all the other departments of positive law.

(d) From those rules of the law of nations which rest on consuetude, and not on treaty, or which are enforced by opinion or by war, and not by judicial authority—the manner of their generation, or of their enforcement, making no difference as to the positive character of these rules.

(e) From the *jus naturale* of the Romans, which extended to the lower animals, and included the laws of their physical generation and life<sup>1</sup>—thus embracing, or at any rate mixing itself up with, another branch of natural law, in the wide sense in which natural law is identical with the general scheme of existence.

(f) From the *jus gentium* of the Romans, which was a body of equitable rules, possessing, in a general sense, the character of positive law, and intended to regulate the relations between those who were and those who were not Roman citizens. Gaius's conception of the *jus gentium*, however, as *quod naturalis ratio inter omnes homines constituit*,<sup>2</sup>

<sup>1</sup> Quod natura omnia animalia docuit, nam jus istud non humani generis proprium est, sed omnium animalium quæ in cælo, quæ in terra, quæ in mari nascuntur, avium quoque commune est.—*Dig.* 1. 1. 1.

<sup>2</sup> *Dig.* 1. 1. (*de just. et jure*), 9.



comes very close on the modern conception of natural law; and a still closer approximation is to be found in the sense in which Cicero and the Stoics frequently speak of the *jus naturale*, and in which it occasionally appears in the *Digest*—e.g., “*Id quod semper æquum et bonum est jus dicitur, ut est jus naturale.*”<sup>1</sup>

(g) From *equity*, in the English, and to a certain extent in the Roman sense of a body of positive rules supplementary to the rules of the common law; and, indeed, from *equity* in any other sense, if such there be, in which it is not simply an equivalent for *justice*.

Even when the Prætorian law is spoken of as *naturalis æquitas* (*Prætor naturalem æquitatem sequi dicitur*) and the like, it is meant that the Prætor, in the absence of any positive law, finds out what the positive law of the case really is—i.e., discovers the decision which, in the concrete instance,<sup>2</sup> is in accordance with natural law.

IX. The most noteworthy divisions of the science of jurisprudence are the following:<sup>3</sup>—

i. That of Ulpian, into—

(a) *Jus naturale*: Laws of Animal being;

(b) *Jus Gentium*: General Laws of Human wellbeing;

(c) *Jus Civile*: Roman Municipal Law;

the two latter being subordinated to the former.

The following objections to this scheme present themselves:—

<sup>1</sup> *Dig.* l. 1. 11. Troplong, *de l'Influence du Christianisme sur le Droit Civil* p. 53.

<sup>2</sup> *Dig. ut sup.*; *Gul. Grotii Encheir.*, p. 14.

<sup>3</sup> Savigny, *System des Heutigen Rom. Rechts*, Beylage T. vol. i. p. 413.



1st, *Jus naturale* being equivalent to the laws, not of human wellbeing, but of animal being, includes matter that belongs to physiology and not to jurisprudence. It consequently is not exhausted by its subordinate members, the *jus gentium* and the *jus civile*, which refer exclusively to human wellbeing.

2d, The meaning of the *jus gentium* is indefinite, wavering between that of the *jus naturale* in the modern sense, and the *jus inter gentes* or international law—*c.g.*, the law administered by the Prætor Peregrinus, out of which many of the rules of private international law have arisen.

3d, No other provision is made for the *ius inter gentes*. Cosmopolitan conceptions were familiar to the Stoics, and are traceable to Socrates,<sup>1</sup> but from the relation in which the Romans stood to the rest of the world, they did not recognize international law as a separate branch of jurisprudence. From the conflicts of jurisprudence, however, that ultimately arose from differences in the various municipal systems of the conquered nations, which the Romans did not wholly abolish, they were led to work out many important questions of private international law.

ii. That of Gaius.

(a) *Jus Gentium*: General Laws of Human wellbeing, or Modern Natural Law.

(b) *Jus Civile*: Roman Municipal Law.

Savigny holds this division not only to be the correct one, but the one that was generally adopted by the Roman jurists.

<sup>1</sup> Zeller, *Socrates and the Socratic Schools*, p. 139; and *Stoics, Epicureans, and Sceptics*, p. 308.

It is open, I think, notwithstanding, to the following objections:—

1st, The *jus gentium* and *naturalis ratio* are sometimes used by Gaius as equivalent terms (*Digest* 1. 1. 9), and the conception which he attached to these terms certainly approaches very closely to the modern idea of natural law, but it is scarcely equivalent to it. It varies between the conception of natural law, as a sort of equity of which the Prætorian rather than the civil law was the *viva vox*, and that of the *jus inter gentes*.

2d, The *jus civile*, supposing it to include the municipal law of other nations, as well as that of Rome in all its branches, is not equivalent to positive law, because it does not include the *jus inter gentes*. It consequently does not exhaust the science of jurisprudence on its positive side. It would have done so, however, had the fiction of a universal empire, which the Romans cherished, become a reality; because there could in that case have been no *jus inter gentes*. This last objection consequently has no logical validity against the Roman jurists.

3d, The Roman term which most nearly approaches to the modern conception of positive law in general, is *lex*. Cicero<sup>1</sup> opposes *natura* to *lex*, and explains *natura* by the term *jus gentium*, and *leges* as equivalent to *jus civile*. Elsewhere he divides *jus* into *natura* and *lex*. Elsewhere, again, he uses it in a sense which would identify it with the modern ‘*jus naturale*.’ *Lex est ratio summa, insita in naturâ, quæ jubet ea quæ faciendâ sunt, prohibetque contraria* (*De legg.* i. 6).

In general, however, the word *lex* was used in a narrower

<sup>1</sup> *De off.* iii. 5.

and wholly technical sense. *Lex est quod Populus Romanus senatorio magistratu interrogante, veluti consule, constituebat* (Just. 1, 2, 4); or *Generale jussum populi aut plebis, rogante magistratu* (Capito; Gell. x. 20). This Cicero speaks of as the popular use of the word (De legg. i. 6).

*Jus civile*, again, is no doubt used in a wider or a narrower sense, according as it does or does not include the *jus pontificium*, or is or is not opposed to the *jus pratorium* or *honorarium*. But it is never intended to include in it the *jus gentium* in the Roman, and still less in the modern sense, and consequently it never corresponds to positive law, as a whole.

### iii. *Modern Division.*

(a) Natural Law, or Permanent and Universal Laws of the human relations.

(b) Positive Law, or Variable and Particular Laws of the human relations.

Positive law being further subdivided into—

(c) Municipal Law: the *jus civile*, or *jus gentis*, public and private.<sup>1</sup>

(d) International Law: the *jus inter gentes*, public and private.

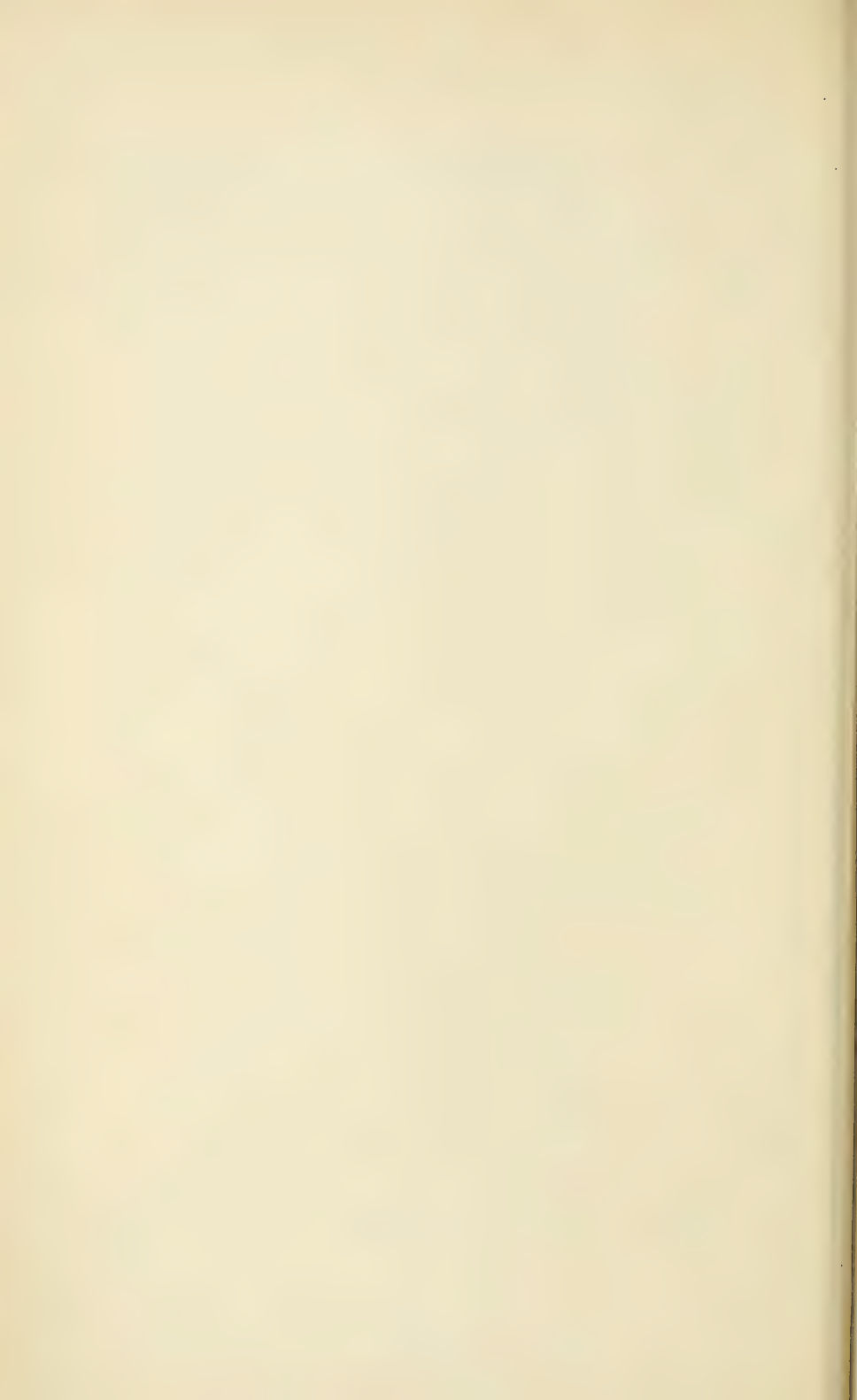
### *Vindication of the Modern Division.*

The modern division proceeds on the hypothesis that the question, to what extent the limits of positive law shall be made, for the time and place under consideration, co-extensive with those of natural law—that is to say, to what extent

<sup>1</sup> The division of law into public and private was known both to the Greeks (Demosth. in *Timocrat.* 760, § 192), and to the Romans (*Instit.* 1. 1. 4).

natural law shall be enforced, or left to vindicate itself indirectly—is a question of what is vulgarly called expediency ; and this hypothesis, as we shall afterwards see, is warranted by the results of the science of jurisprudence. No portion of the sphere of natural law<sup>1</sup> is theoretically, or *ex hypothesi*, excluded from the sphere of positive law. Its realization may be impossible, or it may be unnecessary and therefore inexpedient, but it is never illegitimate ;—and municipal and international law, which form the sole constituent elements of positive law, are thus adequate to exhaust the sphere of natural law in the modern, though not in the ancient sense.

<sup>1</sup> As to the relation between natural law and ethics, *v. infra*, book ii. chap. 1.



# BOOK I.

OF THE SOURCES OF NATURAL LAW





## CHAPTER I.

### OF THE SOURCES OF NATURAL LAW.

THE word *source*, when applied to the science of jurisprudence, is frequently used in a double sense. On the one hand it is taken to indicate the fountain from which natural law and all subsequent laws derive their authority; on the other hand it is used to designate the means by which we become acquainted with the precepts of law. It is from this cause that doctrines which are really complementary are so often regarded as exclusive of each other. With this distinction, then, in view,—

The sources of natural law—which, taken in conjunction with the local and temporary relations in which man stands to surrounding existences, are likewise the sources of positive law—may be divided into *Primary* and *Secondary*.

1st, *The Primary Source, or Source of Law itself*.—God,<sup>1</sup> the Creator, the One first Cause of all things, is the one

<sup>1</sup> Some of my critics have objected that by making God the Source of natural law, I give in my adhesion, at the outset, to the theological school. They might just as well have said that a botanist, by making God the Creator of plants, asserted that the science of botany was directly revealed. So far, surely, we may say with Chrysostom, “ὅταν δὲ εἶπω τὴν φύσιν, θεὸν λέγω.”

Primary Source of natural law—the inevitable postulate of jurisprudence, as of all other sciences.

I take it for granted that the necessary character of our recognition of a single cause, as the starting-point of being, has already been brought under your<sup>1</sup> notice in the classes of metaphysics and moral philosophy,<sup>2</sup> and that I should be wasting your time were I to insist on such propositions as that, by the constitution of our minds, we can neither think of the series of effects and causes as interminable, or as terminable. We must be contented to begin with a postulate—that is to say, with an assumption which we do not seek to explain; and the narrowest basis of assumption is philosophically the best. To postulate two causes would be to stop short of the last step which reason necessitates. Nor shall I detain you with the testimony from the history of opinion which might readily be produced in support of this proposition; for, as the laws of thought admit of no exceptions, if its acceptance be a necessity to any mind, it must be a necessity to every mind. As I shall explain to you more fully hereafter, when we consider the canons which limit and regulate the application of historical evidence, it is only when the necessary character of a truth is equivocal that an *a posteriori* demonstration of its acceptance by mankind becomes important.

The study of the attributes of Deity belongs specially to the science of theology; and as the jurist is beholden to the metaphysician for the primary source of his science, so there

<sup>1</sup> Here, and occasionally throughout, I have permitted the style of direct address to my students to remain unchanged, as I believe it will occasion no inconvenience to the general reader.

<sup>2</sup> Hamilton, *Metaph.* vol. ii. p. 353 *et seq.* Krause, *Naturrecht*, p. 14.

are certain characteristics of that source which he accepts at the hands of the theologian. The reality of the attributes of omnipotence and perfection is guaranteed by evidence as irrefragable as that which assures us of the existence of the Creator, for—

(a) Creative power and omnipotence are equivalent terms. We cannot think of a power that is limited as creative, for in that case what do we make of the power that limits it? It, of course, becomes *the* creative power, and we only go a step further back. From this difficulty even the hypothesis of dualism does not save us; for that is the denial of any original starting-point. Dualists, consequently, as we shall see hereafter, either prove untrue to their own system by giving supremacy to one or other of two different principles, or take refuge, like the rest of us, in a single postulate. And if this be true of dualism, it is still more true of polytheism, which is simply a surrender of the problem of creation altogether. Whatever may be said for the historical priority of polytheism, it is a creed which must vanish with the first streaks of the dawn of speculation even in the savage mind.

(b) The creature, as such, can have no ultimate measure of perfection but the Creator. In acknowledging His existence, we consequently accept His character, and own allegiance to His law.

These Divine attributes—omnipotence and perfection—the one of which subsumes relative under absolute freedom, and the other of which subsumes relative under absolute reason—are inseparable from the conception of a primary source of law; for—

(a) "Force," as has been well said, "being the root idea of law,"<sup>1</sup> if God were not potent He could not be a source of law at all.<sup>2</sup>

(b) If He were not omnipotent, nature might have another, anterior, and superior lawgiver. And finally,—

(c) If He were not perfect, the laws which nature has received from Him would not carry their own warrant with them, and there might be better and wiser laws to which it would be our duty to conform. The attribute of *omnipotence*, as we shall find hereafter, is our warrant for the assumption that in the last analysis, ultimately, absolutely, *might is right*, and the first stone in the edifice of the *de facto* system of jurisprudence. The attribute of *perfection* is, in like manner, our warrant for the assumption that *right is might*, and the first stone in the edifice of the *de jure* system of jurisprudence. And these two systems, so often opposed by the narrowness of human intelligence, are just as inseparable as power and goodness in our conception of God. Take away absolute power—

<sup>1</sup> *Reign of Law*, by the Duke of Argyll, p. 70.

<sup>2</sup> "To set up laws as self-acting," said Dr Carpenter in his presidential address to the British Association (Aug. 14, 1872), "and as either excluding or rendering unnecessary the power which alone can give them effect, appears to me as arrogant as it is unphilosophical. To speak of any law as 'regulating' or 'governing' phenomena, is only permissible on the assumption that the law is the *modus operandi* of a governing power. I was once in a great city which for two days was in the hands of a lawless mob. Magisterial authority was suspended by timidity and doubt; the force at its command was paralysed by want of resolute direction. The 'laws' were on the statute-book, but there was no power to enforce them. And so the powers of evil did their terrible work, and fire and rapine continued to destroy life and property without check, until new power came in, when the reign of law was restored." The short and terrible episode of the Commune to which Dr Carpenter here refers, was a case in which the powers of kosmos and chaos, good and evil, were fairly pitted against each other, and in which the *vis major* proved to be the former.

omnipotence—and you convert the Creator into a creature, and frame a system of jurisprudence which you have no means of realizing—a mere ethical dream. Take away goodness—absolute perfection—and your God, for anything you can assert to the contrary, may become a devil, your ethical dream vanishes, and you have nothing to realize. This appears to have been the sad outcome of Mr Mill's philosophy.

For these reasons it is obvious that a science of natural law can no more be founded on an hypothesis of polytheism, dualism, or pessimism, than on the hypothesis of atheism or nihilism.

Of the extent to which a natural law may be realizable under a polytheistic scheme, which, whilst ascribing certain divine qualities to many separate beings, confines creative power to a single divinity, I shall have something to say hereafter. But it may be proper that I should at once explain that under the epithet "dualism" I include any religious system, whether professing to be Christian or not, which divides power, ultimately, and as a necessary consequence, equally between a good and an evil principle; and that I characterise as "pessimism" any system which makes its supreme God guilty of what the nature which He has implanted in us characterises as sin,—as, for example, by imputing to Him the condemnation of unbaptized infants to everlasting torments, the creation of a race of beings originally sinful, the predestination of beings whom He made in His own image to everlasting and objectless damnation, the creation of a world where evil exists which is not the mysterious minister of good, or any other transgression of His own



laws, as these laws are revealed to us through nature. The existence of such a being appears to me to involve contradictions which render it unthinkable. I extremely regret that, by an expression of opinion involving what I believe is called "Universalism," I should separate myself from many theologians, both dead and living, whom I love and reverence,—nay, that I should run counter to what, if orthodoxy were to be determined by a show of hands, might still perhaps claim to be the "teaching of the Church." But holding as I do that our last appeal is to our own reason, as at once the representative and the interpreter of the divine element within each of us, I feel that no amount of authority could commend to me a doctrine which my reason rejects as inconsistent with the goodness, the power, and the wisdom which she teaches me to attribute to the Source of my being.<sup>1</sup>

As regards logical consistency, the pessimistic has advantages over the dualistic hypothesis. On the hypothesis of dualism a system of jurisprudence which entirely reversed our present conceptions of right and wrong would be *equally* legitimate. Whilst I am teaching here in the name of Ormuzd, a colleague in the next room might be teaching with equal authority in the name of Ahriman. On the hypothesis of pessimism, on the contrary, my colleague would be entitled to turn me out. Had Mr Mill given supremacy to the devil, he would have found in his omnipotence a "Source" on which he could logically build. If he could not bring Might and Right together, he might have brought Might and Wrong together,

<sup>1</sup> The opposite view is stated, with great learning and acuteness, in *Universalism and Eternal Punishment*, by the Rev. John Gibson Cazenove, M.A.

and thus have found what his friend Mr Bentham would have called a "sanction" for evil. But denying as he does the supremacy of *either* principle, he fails to set foot on the "rock of ages" altogether, and builds his house on the sand. He stops short, indeed, at mere human opinion, or rather at his *own* opinion, and declares that to be right which he conceives to be useful to him, and to those whose tastes correspond with his, and its contrary to be wrong.

To pantheism the jurist stands in a somewhat different relation, because it is a creed which assumes various forms, and has received many explanations, some of them probably not inconsistent with the belief in the existence of a single beneficent power, the study of which power, in its manifestations, might reveal an absolute law of human life and progress.<sup>1</sup> But whenever pantheism is carried beyond an assertion of the universal presence of the Divine, and consequent prevalence of law,—an assertion which is not inconsistent with the Christian conception either of God or man,—the following objections seem fatal to it as an hypothesis on which to base jurisprudence.

1st, The identification of the universe with God—of Becoming with Being—leads to the same result as the identification of God with the universe,—of Being with Becoming,—viz., an alternative between atheism, *i.e.*, the denial of Creative Power altogether, and a postulate of separate creative power, the character of which may be good or evil. So far pantheism is on all-fours with materialism—it is either incomplete or illogical. It is incomplete if it leaves nature still in want of

<sup>1</sup> This is probably what Grotius meant—*Proleg.* § xi.

a postulate, still unaccounted for, and its character undetermined. It is illogical if it assumes the beneficent Creative Power independent of nature, which it professes to repudiate. Materialism, thus arrayed in borrowed feathers, is what is commonly meant by pantheism,—in this country at all events, and in France.

2*d*, The hypothesis of a self-developing God is an anthropomorphic conception which implies imperfection. The qualities or attributes of such a God could never furnish a starting-point to existence, or supply an absolute standard of right and wrong.<sup>1</sup>

3*d*, Pantheism, by identifying the soul of man with the soul of the universe, not only sets ultimate limits to human freedom—as every scheme which recognises Divine Omnipotence must do—but even within these limits it renders freedom merely apparent.<sup>2</sup> By annihilating personal responsibility in man, it thus takes away from the human law-giver all right to enforce compliance with the conditions of

<sup>1</sup> Ahrens, i. p. 75.

<sup>2</sup> To what extent Hegelianism may or may not be open to these or any other objections against pantheism, is a question on which I offer no opinion. Whether or not Hegel laid an adequate basis for freedom is a point on which much difference of opinion prevails. That he intended to do so, on the other hand, is a fact which cannot, in common fairness, be disputed. The first three sections of Bunsen's *God in History* contain what I believe to be a correct statement of the relation in which the later German schools stand to pantheism; and I think that, as regards much of the criticism of them in this country, Bunsen has hit the nail on the head, when, in speaking of the Chinese, he says afterwards (p. 248), "It is by no means needful to extort from the Chinese a confession of faith in 'a personal God,' in order to free them from the reproach of holding a completely materialistic view. For those who talk of a personal God often use expressions concerning Him which betray a very low and unworthy religious consciousness. But a *conscious* God there must be, and this consciousness must correspond to our

wellbeing and progress, even supposing these conditions to be discoverable.

By thus reverting to fatalism, and rendering results independent of voluntary action, pantheism takes away all motive either for complying or enforcing compliance with these conditions. In this respect a curious meeting of practical consequences is exhibited between the philosophical system which denies the personality of God, and the religious system which recognizes monotheism in its extremest form. Were any European nation really to adopt pantheism as its creed, in the sense in which pantheism identifies itself with materialism, it would probably suffer from the famines and pestilences which so often overtake Mahometan<sup>1</sup> populations.<sup>2</sup>

4th, By identifying the creature with the Creator, pantheism annihilates the conception not only of responsibil-

consciousness of Him." The same thought is more fully elaborated in other passages of this great work—*e.g.*, vol. ii. pp. 317-346. The correct view of the matter probably is, that God is not *a* person, but *the* person—personality itself; whereas man is a person in virtue of his limited realization of personality. It is to personality when seen from the side of its limitations that we give the name of individuality. As regards human freedom, again, if all that German speculation has done is to distinguish it from mere lawless caprice, and to define it as consisting in an identification of the limited personal with the unlimited universal will, in what does this differ from the common Christian conception of freedom in which we have all been brought up? Do we not say that the "service" of God is "perfect freedom," and are we not taught to pray that our will may be blended with His? Had not even the heathen world come to recognize the fact that *Deo parere libertas est*? Zeller's *Stoics, Epicureans, and Sceptics*, pp. 169, 315, notes.

<sup>1</sup> In the spelling of this word, having no opinion of my own, I have followed Sir William Muir.

<sup>2</sup> That Germany is not practically pantheistic, whatever she may be theoretically, is demonstrated by her recent history; for no country in our time, or probably any other time, ever trusted so little to Fate.

ity, but of separate existence in the creature. When unity is asserted in this exclusive sense, all law of relations disappears; for if all be God there are no creatures, and consequently there can be no relations between them. Thus, whether pantheism be true or not ultimately and absolutely, it can never form the basis for a science of jurisprudence. A human science must be contented to accept the phenomenal as the real, and the separate character of our own existence is a phenomenon which we at any rate cannot question. On the other hand, however, this separation between Creator and creature differs essentially from the separation between creature and creature. Even creatures, it is true, are not separated in the sense of being entirely independent of each other; but their mutual relations resemble that of branch to branch, whereas they are all related to the Creator as branch to root. The root continues to send its influences—in this connection, its will—through the whole of them, and it is this continued relation to and identification with the Divine which renders a direct revelation of Divine will by consciousness conceivable. In revealing the Divine will, human consciousness reveals its own ultimate will,<sup>1</sup> and is thus within its legitimate sphere. The objection to direct internal revelation, that consciousness can reveal nothing beyond its own phenomena, thus falls to the ground, for the Divine will is seen to be a phenomenon of consciousness, both in the individual and in the race. It does not follow, however, that it is not a phenomenon, the reality and the character of which the *ego* will do well to test by observation of the *non-ego*,—and

<sup>1</sup> *Infra*, p. 60, note.



hence, as we shall see hereafter, the importance which attaches to the historical method.

From these observations it will be apparent that, on the penalty of relinquishing an absolute basis for his science altogether, the jurist must be a believer in the absolute supremacy and goodness of *one personal*, that is to say, *conscious, God*; and it is a historical fact of great significance, that this creed has actually been held by every jurist whose system rises above mere empiricism, not only in Christian, but in heathen times. To the extent, then, of vindicating this simple creed, the science of jurisprudence, in laying its own foundations, falls together with the sciences of theology, ethics, and psychology.

As regards the further relation of jurisprudence to these sciences,—absolutely there is, of course, no philosophical question which is indifferent to the jurist; and hence the necessity of that general scientific training which precedes his professional studies. But on the principle of the division of labour, which applies to scientific research as to every other department of activity, he will do well to decline all discussions which bear on his science only in the wide sense in which it was regarded by the Jesuits as a branch of theology,<sup>1</sup> and in which some Protestant writers have identified it with ethics.

The question, for example, whether the law of nature, or the moral law, originated in an act of God's free will, or whether it existed from all eternity and continues to exist independently of His will,—whether it be a law of God or a

<sup>1</sup> *E.g.*, by Suarez of Grenada, in his great work *De Legibus*.

law to God,—much as it has been discussed both by jurists and moralists,<sup>1</sup> may be dismissed, not only as insoluble, otherwise than by the identification of God and Law, but as irrelevant, because the science of jurisprudence will rest with equal security on either of the two alternatives which it offers. All that is demanded for the foundation of a human science is a starting-point which transcends humanity.

For similar reasons we may well content ourselves with humbly recognizing the hitherto impenetrable mystery which covers the origin of evil. As regards the nature of evil, however, the case is different; for if a belief in the absolute character of good be indispensable to the attainment of a basis for our science, this belief will scarcely be gained unless our study of nature should enable us to assign a relative character to evil. To make evil absolute, and sin, which God hates, eternal, is to limit His power, and to put Him very nearly on a footing of equality with the devil. If not altogether dualism, it is certainly Manicheism. On this point the lawyer's creed must be that of Plato and St Augustine,<sup>2</sup>—the creed which had been revealed to Job,<sup>3</sup> which Heraclitus had divined,<sup>4</sup> and which, with Bunsen,<sup>5</sup> I believe to be the instinctive creed of mankind.

<sup>1</sup> Leibnitz has stated the argument for the independence of law with great force, but the solution at which Suarez arrives, *lex = deus ipse*, seems to me the true one. See Trendelenburg's *Kleine Schriften*, and *Historische Beiträge zur Philosophie*, where the fullest information regarding Leibnitz's incidental activity as a jurist will be found.

On the respective views of Cudworth and Descartes, v. Tulloch's *Rational Theology*, vol. ii. p. 289.

<sup>2</sup> Emile Saisset's introduction to his translation of the *Civitas Dei*, p. xxxi.

<sup>3</sup> Job i. 6-12.

<sup>4</sup> Schwegler's *Hist. of Phil.* p. 22.

<sup>5</sup> *Ut sup.* i. 23. Bunsen has brought out the important fact that the original

The necessity of this opinion, for the purposes of our science, has been strongly felt by the latest school of scientific jurists in Germany,<sup>1</sup> those who agree with Hegel in scarcely anything else accepting his dictum that evil must be regarded as “a negative element.”<sup>2</sup>

Without dwelling further, then, on subjects which belong to the sphere of theology, permit me, in conclusion, to indicate one very important practical effect which the recognition of the divine origin of jurisprudence has exercised on the organization of society.

The place everywhere assigned to the lawyer lies between that of the priest and the secular layman,—in general considerably nearer to the former than the latter.

In the East, in theocratic countries, and amongst the Shemitic races more especially, the offices of the lawyer and the priest are combined in the same individual. The laws of Moses and of Mahomet, and in a lesser degree those of Manu, and even of Confucius, are religious as well as legal systems. In those of Zoroaster the former is the prevailing character, though both are combined. Scribes, Pundits, Muftis, Ulemas, Mollahs, Kadis, all belong to the sacerdotal class. Nor do the races which trust to indirect, differ much from those which lay claim to direct inspiration in this respect. The classical nations spoke of us as “Priests of Justice.” You remember the magnificent passage from Ulpian with which the Digest opens; in which, after deriving *jus* from *justitia*, he exclaims: “Cujus merito quis

Hebrew conception of Satan (*Azazel*) was that not of the opponent and rival, but of the servant of God—God’s Retributive Justice. *God in History*, vol. i. p. 102.

<sup>1</sup> Krause, pp. 216-220. Ahrens, pp. 128, 147, 170, 172, &c.

<sup>2</sup> *Phil. of History*, Bohn’s trans., p. 16.

nos sacerdotes appellet. Justitiam namque colimus : et boni et æqui notitiam profitemur : æquum ab iniquo separantes : licitum ab illicito discernentes : bonos non solum metu pœnarum, verum etiam præmiorum quoque exhortatione efficere cupientes : veram, nisi fallor, philosophiam, non simulatam affectantes.” In Christian times the separation between the priest and the jurist dates from the period when the universal priesthood of Christians was acknowledged, and it has been fully accepted only in those countries in which that recognition has taken place. In the middle ages the canonists, and not unfrequently the civilians, were priests ; and in Rome, so far as the papal authority extends, the same arrangement prevails at the present hour. The Lord Chancellor of England, till the eve of the Reformation, was invariably an ecclesiastic, and there are instances of the Seals having been held by bishops down to so late a period as 1625. Even now many of the functions of the Chancellor are connected with the Church, and it is only yesterday that its ecclesiastical character was laid aside by an important branch of the legal profession in England. The judicial character of the House of Lords still (1880) exists with reference to Scotland, and bishops may sit in Scotch Appeals. On the Scotch Bench, as originally constituted, one - half of the judges, besides the president, were Churchmen, and Churchmen sat upon it even after the Reformation. In the academical hierarchy of all European countries, the Legal ranks next to the Theological Faculty, and by some Universities it has been regarded as dealing with the same subjects.<sup>1</sup> As civilization advances, and social arrangements be-

<sup>1</sup> Suarez, *De Legibus*, lib. iii.

come more complicated, a division of labour becomes inevitable, by which the judicial is separated from the sacerdotal office ; but their original connection ought never to be forgotten by the lawyer who would duly appreciate the dignified and sacred character of the profession which it is his privilege to exercise.

II. The secondary sources or channels of the Revelation of Natural Law are of two kinds,—*Direct* and *Indirect*.

1st, *Direct revelation*.

(a) *Miraculous revelation to man*.—All direct revelation partakes of a supernatural character ; but its miraculous character is most marked when it assumes the shape of an external communication from God to man—in other words, when God, as what we, by analogy, call a Person, manifests himself to man, and makes him acquainted with His will. Of revelation, in this sense, the only instances admitted in Christian countries are those narrated in the Bible. Whether these interpositions are to be regarded as violations or suspensions of natural law, or as acts in accordance with higher natural laws than are known to man or traceable by his present faculties, is one of the many speculative questions which the jurist, as such, is not called upon to discuss.

(b) *Miraculous revelation through man*.—When God makes choice of an individual man as a passive instrument for the conveyance of His will to mankind—though that will be not conveyed to him by an external communication—the revelation still possesses not only a supernatural but a miraculous character. The revelation of which the prophets and the apostles were the organs was of this kind, in all cases in which they do not profess to report the very words that were spoken



to them by God. It is to this kind of revelation also that Mahomet, for the most part, lays claim in the Koran.

(c) *Special revelation through man.*—This occurs when God, by the ordinary influences of His grace, makes His law known to the individual mind otherwise than through its conscious processes.

We have here still, apparently, the immediate operation of the primary, without the intervention of a secondary cause, which is said, on the high authority of St Thomas Aquinas, as quoted by Dante, to constitute the character of a miracle.<sup>1</sup> But it differs from the miracle, in the ordinary sense, in this: that it is not entirely independent of the will of the recipient, as manifested either in the relation in which he places himself to God, or by direct petition. This revelation, through the reason (*voûs*), assumes a plainly supernatural, and comes very close on a miraculous character, when it is granted in unusual measure, as, for example, to Socrates.

Bunsen, in my opinion, spoke quite accurately when he characterised Socrates as “the Saint of Athens,”<sup>2</sup> and I assent to the expressions which he uses in a letter to a friend, as reproduced in his life.<sup>3</sup> Referring to the manner in which his friend had spoken of the religious aspirations of the great heathens, Bunsen says: “I should express myself differently as to the religious aspirations of Homer and Socrates, as not derived from exterior sources, no more than the philosophical notions of Deity in Plato, but from that inward revelation of the Spirit of God to which St Paul alludes.” Such I believe

<sup>1</sup> *De Monarchia*, lib. ii. sec. 4.

<sup>2</sup> Preface to the *Theologia Germanica*, lvii.

<sup>3</sup> Vol. ii. p. 424.



to have been the character of the revelation of ethical truth to Socrates. What he said of the *Δαίμων*, I take to have been a mere figurative way of indicating the immediate relation in which he occasionally felt himself to stand to the Divine, and of which all sages and poets, seers and makers, are more or less distinctly conscious. Apart, however, from the loftier character of the subjects to which these revelations usually refer, there is, I think, a difficulty in establishing a distinction in kind between them and those intuitive acts of the mind by which logical processes, for more ordinary purposes, are unconsciously performed.<sup>1</sup> All "happy thoughts" come from God, and may, in a wide and loose sense, be called revelations, seeing that the mind in which they arise stands, for the time being, in an exceptionally close relation to Him.

*2d, Indirect revelation.*

Indirect revelation is the ordinary means by which the law of nature, or, in other words, the will of God, with reference to temporal affairs, is communicated to man.

It is divided into two branches—

(a) Subjective,—The teaching of consciousness, or the revelation derived from the study of the *Ego*.

(b) Objective,—The teaching of external observation, or the revelation derived from the study of the *Non-Ego*, whether material or immaterial.

<sup>1</sup> Duke of Argyll's *Reign of Law*, p. 318.

## CHAPTER II.

## OF THE SCHOOLS OF JURISPRUDENCE.

THE questions whether the various sources of knowledge, direct or indirect, which we have enumerated, be really channels of the revelation of the absolute law—and, if so, to what extent—can be answered only when the character and scope of their teaching has been investigated. On the assumption, however, that they are entitled to that character, it is obvious that the information which they communicate must be harmonious and coincident, even where it is not identical; and that no one of them can be entitled to repudiate another. The methods, however, to which they give rise differ so essentially, and commend themselves to temperaments and races and generations of men so different, as to have originated various schools of jurisprudence, each of which, in its turn, has claimed exclusive possession of the key of knowledge. Of these the most clearly distinguishable are—

1st, The Theological School.

2d, The Inductive or Observational School (Subjective and Objective).

3d, The Subjective, or Philosophical School.

4th, The Objective, or Sensational School.

A few observations on the methods on which these schools severally rely may be serviceable in enabling you to recognise the co-efficient character which, in reality, belongs to them all.

1st, *The Theological School*<sup>1</sup> professes to discover the law of nature, not in the study of nature itself, but in the study of what God has told us of nature. The legitimacy of this method is implied in what has already been said of direct revelation. If the law of nature be identical with the Divine Law,—*i.e.*, with the will of God,—it certainly is possible, and not inconceivable, that He may have made this law known to man directly. No prudent or reverent man, however, I think, will venture on a very sharp definition of the word “directly,” when used in this connection.

The legitimacy of the theological method being admitted, the only questions with reference to it which here are logically open to us are, first, as to its reality; and, second, as to its adequacy or exclusive sufficiency.

(a) *Its reality*.—Though it be possible and credible that God should have revealed His will to man externally as well as internally, it by no means follows that He has done so at all, or that He has done so with reference to the matter in hand. The first of these questions it is not necessary, and would not be suitable, that we should discuss. A direct revelation, with reference to the relations in which man stands to God, is an occurrence in which all Christians and Mahometans, and most Heathens, profess to believe. We shall here assume its reality, with the remark that, inasmuch as it does not profess to have been given to all, its reality is a fact which those who have not personally received it, must always accept from those who have. It is only to the prophet himself that the prophecy is *directly* revealed. His followers

<sup>1</sup> Ahrens, pp. 61, 66.

receive it on his word. As regards the facts of consciousness, on the other hand, each man is his own prophet.<sup>1</sup>

(b) *Its adequacy*.—But assuming its reality, does this revelation bear on the secular relations of men? and, if so, does it alone furnish us with means adequate to the determination of these relations? For this, we must bear in mind, is the thesis which the theological school, as such, professes to maintain.

The leading doctrines of the moral law are, no doubt, laid down in the Holy Scriptures, and inasmuch as the law of nature with reference to the relations of man to man is neither more nor less than these doctrines traced out into their consequences in special directions, the law of nature may, in this sense, be said to have been directly revealed. But recent scholarship has taught us that this assertion must not be limited to the Christian or Hebrew Scriptures. Whether or not the starting-point of ethics was thus attained anywhere may well be questioned, but it is not doubtful<sup>2</sup> that its grand outlines have the double sanction of direct and indirect injunction.

<sup>1</sup> The remarkable revival which Catholicism has experienced, and the attempts which have been made to introduce the confessional into Protestant communions, alongside of, and no doubt as reactions against, materialism and irreligion in our own day, have given a practical importance to the doctrines of the theological school which they did not possess half a century ago. Men knew then, indeed, that such persons as Molina and Bellarmine had asserted that, if the Pope, as the infallible interpreter of external revelation, should declare virtue to be vice and vice virtue, all good Catholics were bound to believe him; but, in a speculative age, the assertion was rather welcomed as a *reductio ad absurdum* which rendered the system innoxious. Now, however, in the absence of philosophy, it is widely accepted as the only refuge against scepticism, which, beginning with religion, has extended to morality, and which, in our own department, threatens to deprive jurisprudence and politics of any basis that is independent of individual caprice.

<sup>2</sup> Neander, *Ch. His.* i. p. 9. Donaldson's *History of Christian Literature*, ii. pp. 167, 183, 198, 225. Ackermann's *Christian Element in Plato*, pp. 19, 53. Aristot. *Metaph.* x. 8.

On the other hand, however, it is important to remark that, in the vast majority of instances, whilst the information which is conveyed to us with reference to the relations of man to God are express, that which has reference to the relations of man to man only admits of being partially gathered from incidental expressions, or from the life and conduct of Christ. What is revealed, primarily at least, "is the ways of God to man," not of man to man. The previous acquaintance of mankind with the law of nature is, manifestly, assumed; and in this assumption we cannot but perceive a plain recognition of, and reference to, other sources of knowledge.<sup>1</sup>

Then, so far from preaching any separate system of positive law relating to secular affairs, one of the objects of Christ's mission was to abolish the only system of the kind that ever was directly revealed to man, and to place the Jews once more in the same position as the rest of mankind. The Roman law, under which Christ himself lived, was expressly founded on indirect revelation interpreted by mere human reason, and, from the beginning to the end of His teaching, there is not the slightest indication of an opinion that it either ought to have rested, or could have rested, on any other.

The exclusive pretensions of the theological school of jurisprudence are specially inexcusable in Christian countries, seeing that Christianity, as a learned and ingenious Frenchman has observed, is "the first religion which does not pretend that law is dependent on it."<sup>2</sup> A natural conse-

<sup>1</sup> The 119th Psalm is a long prayer for the indirect revelation of natural law.

<sup>2</sup> De Coulanges, *Cité Antique*, p. 518.



quence of thus attempting to derive guidance from a source which was not intended to afford it, has been the most wonderful diversity in the results arrived at by theological inquirers. From absolute monarchy and patriarchal and hierarchal despotism, to democracy, communism, and anarchy, there is no condition of political or social existence which has not sought to justify itself by an appeal to the theological method.<sup>1</sup> Nor is it wonderful that such should have been the case, for it is obvious that anything may be proved by a system which relies on documents compiled for other purposes, and which, by repudiating reason, has moreover freed itself from the fetters of an independent organ of interpretation.

But though the teaching even of Christ was not intended to supersede the revelation through nature, and from the identity of their source in the divine, to say nothing of the human character of Christ himself, cannot possibly have contradicted it, it does not follow that Christianity did not correct and supplement the conceptions which mankind had hitherto entertained, or would otherwise have been in a condition to form, of natural law. To the fact of its having done so, the vast difference between our conceptions of the rights and duties of human beings and those entertained by heathen or Mahometan nations, or even by the classical nations of antiquity, bears witness. Wherever any secular doctrine is to be found, then, in the Holy Scriptures, the presumption—inasmuch as God does nothing needlessly—is, that it communicates knowledge beyond what was attainable, or at any rate

<sup>1</sup> For an enumeration of writers, *v. Ahrens*, p. 64.



had, up to that period, been attained by the ordinary means of observation and reasoning, and it is therefore to be studied by the jurist with reverent diligence and care. When compared with the information which he obtains through the indirect channels of our knowledge, he will often find that the greater completeness of its dicta enables him to decide between conflicting opinions, and even becomes the starting-point of new scientific investigations.

Let me give a single instance of what I mean. The school of jurisprudence which sets out with the vindication of the *rights* of the individual, very frequently falls into the error of teaching us to prefer ourselves to our neighbours, and ends in justifying selfishness, either in the form of unjustifiable aggrandisement, or equally unjustifiable non-intervention. The opposite school, which proposes to itself the inculcation of the *duties* of the individual, tells us to prefer our neighbour to ourselves, and often falls into asceticism and fanaticism, and recommends institutions and enactments by which our neighbour suffers even more than ourselves. But the Bible enjoins us to love our neighbour *as* ourselves; and in thus proclaiming the *exact* reciprocity of rights and duties, direct revelation, whilst it confirms the ethical teaching of the Socratic school, indicates the direction in which scientific jurisprudence, by supplying a measure at once of rights and duties, yields, as we shall see hereafter, its last and most precious fruits.

Yet how universally human such a sentiment is, appears from such a fact as that the Brahmans reproached the Buddhists with having stolen the precept of universal benevolence

from the Veda.<sup>1</sup> It was consequently a sentiment which both professed to hold, and at which we can scarcely imagine that either of them arrived otherwise than by what are commonly called human means.

Englishmen generally, including Mr Herbert Spencer,<sup>2</sup> as the latest exponent of national peculiarities, fall into the error of representing Christianity as exclusively "altruistic," and heathenism, as exhibited in the Greek and Roman writers, as exclusively "egoistic." Both statements possess truth enough to suit them for popular and declamatory purposes, but, in any stricter sense, are quite erroneous. As regards Christianity, let the example which I have given above suffice. As regards Heathenism, I shall take an example far more remote from Christianity than the Greek and Roman writers. In the Chinese classics, the "golden rule" is everywhere to be found. In the Confucian Analects, for example (Book V. Chap. XI.), it is written: "Tsze Kung said, 'What I do not wish men to do to me, I also wish not to do to men.' The master (Confucius) said, 'Tsze, you have not attained to that.'" In a previous passage the doctrine of the master is thus explained: "The master went out, and the other disciples asked Tsang, saying, 'What do his words mean?' Tsang said, 'The doctrine of our master is to be true to the principles of our nature, and the benevolent exercise of them to others,—this, and nothing more.'" <sup>3</sup> Again, in the 'Doctrine of the Mean,' (p. 258), we find that this view was held not less firmly by the followers of Confucius than by himself. "When

<sup>1</sup> Max Müller's *History of Ancient Sanscrit Literature*, p. 85.

<sup>2</sup> *Sociology*, p. 184.

<sup>3</sup> Chinese Classics, vol. i. pp. 33, 34, and 41.

one cultivates to the utmost the principles of his nature, and exercises them on the principles of reciprocity, he is not far from the path. What you do not like when done to yourself, do not do to others." Passages to a similar effect might be quoted to almost any extent from the religious literature of the other oriental races with which scholars have made us acquainted during the last twenty years.

*2d. The inductive or observational school (subjective and objective).*

Apart from such knowledge as is conveyed to us directly, or which we obtain by efforts of which we are unconscious, all that we know either of the law of nature, or of anything else, must be learned by the ordinary processes of conscious observation and reasoning; and, consequently, all the actual, or indeed possible, schools of jurisprudence, except in certain aspects the theological, belong, strictly speaking, to a single class—viz., the inductive or observational.

Bacon did not limit the inductive method to physical inquiries, but declared it to be the true method of scientific inquiry universally. Since the time of Descartes, at all events, its applicability to the study of man and his relations has scarcely been disputed; and whether we prosecute it subjectively or objectively, or both, the science of jurisprudence is an inductive science, just as much as chemistry or psychology. But the inductive or observational school of jurisprudence, though its two branches rest on a common foundation, is a house divided against itself, the occupants of which have been in the habit of barring their doors against each other even more determinedly than against the theologians,

with whom some of them<sup>1</sup> have even been willing to claim kindred.

The inductive school as a whole, then, may be divided into two sections,—the subjective and the objective, or that which relies for its starting-point on the observation of internal phenomena, and that which regards external phenomena as all-sufficient.

By including the sources on which they respectively rest amongst the sources of our science, we have already recognized the legitimacy both of the subjective and objective methods, and entered our protest against the claim of either of them to exclude the other. In support of this protest, and in illustration of their necessary dependence on each other, one consideration alone would seem to suffice—viz., *that the supreme rule of life which we seek is neither a doctrine of rights nor a doctrine of duties, but a doctrine of the relation between rights and duties.* But a relation can become intelligible to us only when we know both of the parties related; and as rights have a subjective and duties an objective origin, a knowledge of the relation in which they stand to each other necessarily implies a reference both to subjective and objective sources of knowledge.

These considerations, however, obvious as they seem, have not prevented men opposed to each other by personal and national genius from attempting to create two schools, each resting solely on one avenue of knowledge, and as such mutually exclusive.

3d, *The subjective, or so-called philosophical school.*—The ex-

<sup>1</sup> Paley, for example, who occupies the singularly incongruous position of a theological utilitarian.

clusive claims of the study of our subjective nature (the personal Ego) to enlighten us with reference to the ultimate law, rest on metaphysical speculations which have lost their hold on the country in which they originated, and are so little in accordance with the habits of thought which prevail amongst ourselves that, even if I possessed a clear understanding of them myself, which is far from being the case, I should be disposed to leave them to the experimental refutation which, I trust, the use of the double method of inquiry in the subsequent pages will supply.<sup>1</sup> One advantage over all other methods the subjective method (*die Ableitung aus der reinen Vernunft*) unquestionably possesses—viz., that to mankind in general, it alone is or can be direct. Our faculties of self-observation may indeed deceive us, but we cannot be deceived by another. We take nothing on external testimony, and thus avoid at least one source of error. But to my mind, the objection just stated—that a relation cannot be known by a knowledge of one of its terms—seems to be fatal to the exclusive claims of the subjective method, to an extent to which it is not, theoretically at least, to the objective method. An objective induction, sufficiently wide and sufficiently accurate, would yield a law of relations which might be assumed to include the subject, and thus to possess universal validity; but inasmuch as we could have no security that the individual was not exceptional, no observation of subjective phenomena, however exhaustive, could with equal safety be assumed to cover the

<sup>1</sup> In saying this, I am far from questioning the necessity of starting from the Ego (*infra*, p. 53). On the contrary, I fully subscribe to the saying of Krause, that “im Gedanken des Ich, der Gedanke der Rechts wesentlich mitenthaltend und mitaufgegeben ist,” p. 87.



field of objective existence. Neither method, as we have said, would be trustworthy, apart from the other; but in this point of view, at least, the objective method would offer many chances to one, whereas the subjective method would offer only one chance to many. The subjective method, on the other hand, would have the advantage in its starting-point; for how could I ever come to know anything of my neighbour's rights except by contrasting them with my own? The exclusive claims of the subjective method, however, for the reason I have mentioned, need scarcely be discussed in this country.

*4th, The objective, or sensational school.*—The case is very different with the claims of objective experience, which for generations has seemed to the common English mind not only to supply the sole legitimate method of inquiry into the rule of life, but, by furnishing a rule of life in itself, to supersede the necessity of the inquiry altogether.

The utilitarian doctrine thus occupies two positions, from the one to the other of which it is continually shifting, but which require to be carefully distinguished, seeing that in the one it is, and in the other it is not, entitled to take rank as a legitimate method, and to claim a place in the science of jurisprudence.

1. In the first and most ambitious position which it assumes, the doctrine of utility claims to furnish us with a test of the quality of our actions, to constitute in itself a rule of life, and thus to supply the place of the law of nature, the reality of which it denies. Of the confusion of thought involved in this claim we have instantaneous proof if we reply to it by the question, "*Useful for what?*" Actions are means, not ends, and their quality can be tested only by reference



to some final end or object (τέλος) which they seek to attain, the measure of their value being the approach which they make to its attainment. If the rule be, "follow virtue," "follow pleasure," "follow nature," the realization of whatever we may choose to characterize as "virtue," or "pleasure," or "nature," is the object of the rule; and the value of each particular action will be greater or less in proportion to the extent to which it accomplishes this realization. But "follow utility" is a rule which has no object—a fingerpost that points nowhere! So far, then, from possessing the merit so often claimed for it, of supplying the simplest of all tests of conduct, the utilitarian system furnishes no test at all, and has consequently to accept its test from some one or other of the systems which it repudiates. It is for this reason that it is held by persons of the most opposite character and opinions, who deduce from it the most opposite results. In Mr Bentham's hands, and those of the majority of his conscious followers, its object has been "happiness," so defined as to rise little above animal enjoyment, and utilitarianism has thus been equivalent, not to eudæmonism in the Aristotelian sense, but to hedonism in the sense of the later Epicureans. Stung by the reproaches to which so ignoble an object and so degrading a system exposed their adherents, Mr Mill, in his later writings, has sublimated utilitarianism into something that might be called transcendental-eudæmonism.<sup>1</sup>

<sup>1</sup> In an interesting passage in his Autobiography, p. 189, he even speaks of the "highest realizable ideal of human life" as the true object of human endeavour, though how this ideal should have possessed such value in the eyes of one who regarded "the pretended perfection of the order of nature and of the universe" as a "superstition," is not explained. Neither do we learn the means of its dis-

The improvement as regards the object is great. But he has not improved the pretensions of utilitarianism to the character of a self-determining system, or its claim to any higher position than that of a method of inquiry into the objects of life and the means of attaining them, or, in other words, into the law of nature—a position which was never denied to it by any one, except perhaps a subjective idealist.

Let us consider its merits, then, in this latter aspect.

2. Viewed as a method of inquiry into the law of nature, utilitarianism is merely a somewhat unphilosophical application of the method of external observation,—a method which, in the hands of scientific inquirers, has assumed two leading forms.

(a) The statistical, or empirical, which is chiefly known in this country, and of which Mr Herbert Spencer is a brilliant disciple; and—

(b) The historical, of which, in its primary phase, Hugo, Savigny,<sup>1</sup> and the late Sir George Cornwall Lewis may be

covery. If nature and the universe were imperfect it could not come from *within*, for human nature could have no perfect ideal to reveal. Neither could it come from *without*, seeing that direct revelation was repudiated as a still grosser superstition. Disbelief in the order of nature is intelligible, if to nature we attach the lower sense in which the opponents of Stoicism have always taken it. To believe in nature in this sense, in a world in which there is so much *relative* sin and *phenomenal* misery, would involve a denial of the distinction between right and wrong. But to disbelieve in the order of the universe, or in nature in the sense in which it is identified with the order of the universe, is the *ne plus ultra* of scepticism. Even Strauss, in his last and wildest manifestations of unbelief, believed in the “Kosmic conception;” and to abandon Kosmos is surely to part company with reason altogether—in other words, to go mad. To talk of “reverence” after that is to use a word which can have no possible meaning.

<sup>1</sup> A statement of the very sound position which Savigny ultimately took up, and which differs considerably from that which is still popularly ascribed to him, will be found in the introduction to Mr Guthrie's excellent translation of the

regarded as the leading representatives, and which the speculative mind of Hegel developed in new directions.

Theoretically, it is difficult to deny the pretensions of external observation, when directed both to contemporaneous and past events, to the character even of an independent method, because it is possible to imagine an intelligent being, conversant with human life and action, and yet not human. Such a being could, of course, have no subjective revelation of human nature, or of the laws by which that nature is governed; and yet he might, to a certain extent, become acquainted with human nature and its laws by the objective revelation of events—by external observation of actions and their results. To an omniscient mind the *a posteriori* method would, no doubt, yield conclusions universally valid, and we cannot speak of its application as impossible. For a human being to exclude his own nature from his consideration whilst investigating human nature in general, I believe to be impossible. To him the subjective is the only possible starting-point. And as he is himself the mirror in which he beholds the universe, his abandonment of the subjective point of view must always be partial, and is generally illusory. But some approximation to such a one-sided position is perhaps attainable; and to the utilitarian who lays claim to it, all that I can object is, that his method is needlessly imperfect. If he is a human being, he is wantonly throwing away the opportunities which the subjective study of his own human nature affords him of becoming acquainted with human nature in general, and its laws. He is urging, moreover,

treatise on Private International Law, which forms the 8th vol. of the *System des Heutigen Römischen Rechts*, p. 12.

on his own behalf, an exclusive claim which he certainly would not concede to his opponent, who, with equal truth, might allege that, as humanity as a whole is present in the nature of each individual, the study of the *Ego* is alone sufficient to reveal it.

When the claims of the method of external observation are not pushed to this length, it has been eminently fruitful in results; and those who believed that they were demonstrating the non-existence of natural law have often been amongst its best expositors. Still, several very serious practical objections apply to it, which have been stated with great force by its opponents in Germany.

A. Supposing our acquaintance with recent events—the immediate effect of recent enactments, we shall say—to be accurate in point of fact, it is with difficulty that we appreciate them, or, in other words, determine their “utility” for the attainment of any given end whatever, for two reasons—

(a) Because their ultimate consequences are still in the future; and—

(b) Because we see them through the distorting medium of our own feelings and interests.

B. As regards events long past, our information is seldom complete, and even then it is coloured by a triple medium—

(a) That through which the narrator saw it.

(b) That through which he intended that we should see it.

(c) That through which our own passions, prejudices, ignorances, and those of our own time, permit us to see it.

C. From diversity of circumstances, it is for the most part inapplicable as a rule of present conduct.

D. Humanity has not yet culminated, and its absolute laws



cannot therefore be revealed by the study of its previous history. On the assumption that it is progressive, the experience of the present must be more instructive than that of any former period ; and, in this point of view at all events, the facts of statistics are of greater value than the facts of history. The remark of Lord Bacon is, however, to be borne in mind, that the most useful examples are those taken from times most resembling our own, and that these are not always the times that are nearest to us.<sup>1</sup>

*E.* But the leading objection to external observation in all its forms, as an exclusive source of knowledge, is that we cannot begin with it.<sup>2</sup> In whatever light "facts" may be viewed by the historian or statistician,<sup>3</sup> to the jurist they are not ends but means ; and external facts are means which he cannot use till he has gained a starting-point, and acquired a standard which they cannot supply. After we know what our nature craves, and what God wills that it should aspire to, there is scarcely a fact, however insignificant, of observation or experience, which may not furnish precious suggestions for the realization of these objects. Nay, farther, even as regards these objects themselves, it is most true that "there is a light which shines on the ways of God out of a better knowledge, even of man's ways."<sup>4</sup> But the light which man's ways afford is lighted within him, and the reflected light which shines from without has reference far more to the concrete and variable, than to the abstract and permanent element of law. The science of jurisprudence, like charity, must "begin at home ;"

<sup>1</sup> *De Justitia Universali*, Aphorism xxiv.

<sup>2</sup> Krause, p. 91.

As to the scientific significance of Statistic, v. Ahrens, vol. i. p. 5, note.

<sup>4</sup> *Reign of Law*, p. 5.



and the proper answer to the empiric is that which St Luke<sup>1</sup> tells us our Lord made to the Pharisees when they asked Him when the kingdom of God should come. "The kingdom of God cometh not with observation: neither shall they say, Lo here! or, lo there! for, behold, the kingdom of God is within you."<sup>2</sup>

### CHAPTER III.

#### OF THE AUTONOMY OF HUMAN NATURE.

THE science of the law of nature divides itself substantially into three inquiries—

1st, Is the nature of man autonomous; is he a kosmic or a chaotic creature, or, in other words, is man "a law unto himself"?

2d, If so, in what manner is this law revealed to him?

3d, What is the law which man's nature imposes on him, or binds him to impose on himself?

Each of these branches admits of being prosecuted, and has always been prosecuted in point of fact by competent investigators,<sup>3</sup> more or less systematically, both by the philosophical and the historical methods. In so far as it seems possible, we shall not fail to avail ourselves of this double avenue to truth; but in seeking a response to the first question, we shall listen in the first place to what our nature tells us directly.

<sup>1</sup> xvii. 20, 21.

<sup>2</sup> "The master said, 'The path is not far from man. When men try to pursue a course which is far from the common indications of consciousness, this course cannot be considered THE PATH.'"—Legge's *Chinese Classics*, vol. i. p. 257.

<sup>3</sup> Gulielmi Grotii *Enchiridion*, *Index*, p. 3.

The direct or subjective revelations which our nature makes to us of its legislative character, appear to be presented in the following order:—

1st, Our nature asserts its existence, and vindicates its assertion.

Life being the root at once of our rights and our obligations, the knowledge that life is a fact must of necessity be the first step in the science of jurisprudence, as of every other branch of the science of man. Till we know that we are, we can neither know how we are, nor inquire how we ought to be. But our existence is a fact, which each of us must ascertain for himself; and the knowledge of which, by another, we can only assume. If a man tells me that he is not conscious that he lives, I can no more contradict him than if he tells me that he is not conscious that he loves. So far, the primary dictum of consciousness is on a footing of equality with all the subsequent dicta. But it differs from them in this respect, that neither its reality nor its veracity can be denied, or even doubted. If my neighbour tells me that he is conscious that he does not love, I am bound to believe him; but if he tells me that he is conscious that he does not live, or thinks that he does not live, or doubts whether he lives or not, his assertion disproves itself. “The very statement of doubt,” as Dr Adam Fergusson has said, “is a dogmatic assumption of personal existence and thought.”<sup>1</sup>

Nor does the accuracy of this assumption admit of question any more than the fact of the assumption; for, in so far as its first dictum is concerned, the fact that consciousness truly

<sup>1</sup> Fergusson's *Principles of Moral and Political Science*, vol. i. p. 79.

testifies, is proof enough that it testifies truly. "To doubt of the reality of that of which we are conscious," says Sir W. Hamilton, "is impossible, for as we can only doubt through consciousness, to doubt of consciousness is to doubt of consciousness by consciousness. If, on the one hand, we affirm the reality of the doubt, we thereby explicitly affirm the reality of consciousness, and contradict our doubt; if, on the other hand, we deny the reality of consciousness, we implicitly deny the reality of our denial itself."<sup>1</sup>

2*d*, Our nature guarantees the veracity of its testimony with reference to its qualities.

It is true that, without incurring the contradiction which the denial of the primary assertion of subjective being implies, we may deny the veracity of every subsequent assertion of consciousness. But such denial cannot possibly admit of proof, because the truth of the denial can never rest on higher testimony than the truth of the assertion. If the consciousness which tells me that I love be fallacious, the consciousness which tells me that I doubt or deny that I love may be fallacious too. It thus appears that if we deny the truth of any single dictum of consciousness the reality of which as a phenomenon is admitted, the whole fabric of truth is shaken. "If our immediate internal experience could possibly deceive us," said Leibnitz, "there would no longer be any truth of fact, or any truth of reason."<sup>2</sup>

Consciousness, or subjective nature, being thus a living,

<sup>1</sup> Sir W. Hamilton's *Lect. on Metaph.*, vol. i. p. 274; Descartes' *Second Meditation*, and St Augustine's *Civitas Dei*, l. xi. c. 26. See also the introduction to M. Saisset's *Translation of the Civitas Dei*, pp. lix.-lxi.

<sup>2</sup> Hamilton, *ut sup.*, p. 265.

truth-telling witness, let us try what we can learn from it with reference to its legislative character, and the laws which it acknowledges.

3*d*, Our nature asserts that it is the result of a cause external to itself, and independent of its volition.

It has often been said that the sentiment of unconditional dependence is the essential element of all religion. If the same assertion can be made with reference to jurisprudence, we have the first stone of the edifice of the *de facto* system. Is this proposition, then, in accordance with the revelation of nature?

We have seen that our first feeling—that with which consciousness begins—is the feeling of existence, and not of activity; of being, and not of doing.<sup>1</sup> This circumstance at once throws the causative act by which we came into existence out of consciousness. We cannot, therefore, know that we created ourselves. Any theory<sup>2</sup> which does not ascribe our being to a cause independent of our volition, either leaves it unaccounted for, or accounts for it by a gratuitous assumption, at variance with our knowledge so far as it goes.

But from this assumption we are shut out by two considerations—

(*a*) It involves the necessity of conceiving human activity prior to human existence, and by thus ascribing original creative power to a second cause, contradicts our primary postulate of a single first cause.

<sup>1</sup> That actuality must precede potentiality had already become apparent to Aristotle.—Grant's *Aristotle*, vol. i. p. 231.

<sup>2</sup> Such as that of Müller on Sin.

(b) It implies the conception of volition which is unconscious—*i.e.*, of will, without the self-directing quality which is its essence.

4th, Our nature accepts itself as a gift, voluntarily given, but necessarily received.

In pronouncing its source to be independent of its own activity, our nature exhibits itself to itself in the character of a free gift—the gift, by an external and independent agency, to every man of himself, with all the powers and faculties which constitute personality. But it is implied in the idea of a free gift, that no previous right or title to its possession existed in the person of the recipient,<sup>1</sup> even supposing the recipient's person to have pre-existed—a supposition which in the present case is excluded. Whatever rights may result from our nature, it is obvious that no rights can have preceded it, because in that case nature, with its inherent rights, would become a recognition of something which we had already done in our own behalf; and as doing implies being, we should again be entangled in the assumption of self-creation.

Regarding this as the first step in the process of self-investigation, in a strictly jural direction, we see that nature reveals to us not a right, but a possession, the result of no antecedent right, and the necessary source of all subsequent rights. This is a fact to which I beg to direct special attention, as it is one the forgetfulness of which has introduced much confusion into the study of jurisprudence. Rights, it is true, precede

<sup>1</sup> *Actus justitiæ est reddere debitum, sed Deus nulli est debitor : Ergo, Deo non competit justitia. Th. Aq. Summa. Pars prim. Quæ. xxi.*



obligations, as we shall see hereafter, because we must exist before we can come in contact with external existence; but existence is the source and the measure of both, because neither rights nor obligations can spring from, or centre in, the non-existent. A proclamation of the nature of man must consequently take precedence of a proclamation either of the rights or duties of man.<sup>1</sup>

But further, the primary possession of existence thus freely bestowed, must not only be freely but fully accepted.

(a) We cannot refuse it, for from that course we are cut off by the fact that the act of refusal, in this case, already implies the possession of the object refused.

Ere the birth of my life,  
If I wished it or no;  
No question was asked me,  
It *could not* be so.<sup>2</sup>

(b) But if we had neither right to demand existence nor power to refuse it, it follows equally that we had neither right nor power to determine or modify its character. "Shall the thing formed say to him that formed it, Why hast thou made me *thus*? Hath not the potter power over the clay, of the same lump to make one vessel unto honour, and another unto dishonour?"<sup>3</sup> Accordingly—

5th, In accepting itself as *necessary*, our nature accepts itself as *right*, and its fundamental qualities and radical

<sup>1</sup> The remark that the only means of getting a speculative foundation for the idea of right, is by resting it on an ultimate fact, is as old as Thomas Aquinas. "Nihil constat firmiter secundum rationem speculativam nisi per resolutionem ad prima principia indemonstrabilia, vol. vi. p. 290.

<sup>2</sup> Coleridge's *Suicide's Argument*.

<sup>3</sup> Rom. ix. 20, 21.

impulses—those qualities and propensities which are normal to it—as absolutely normal, and consequently as the criteria of right and wrong.<sup>1</sup> Relatively it must be right—it must be right *to us*—because we can have no higher standard than its necessity by which to measure its rectitude. It may be wrong ontologically, but we are logically shut out from supposing it to be so. The universal validity of natural law, if not unquestionable, is undeniable.

At first sight, then, it seems as if this proposition, like the preceding ones, might be left to rest on subjective evidence. Still, the subjective evidence here is only negative. We cannot deny the fundamental rectitude of our nature, but our affirmation seems to stop with the assertion of its individual necessity.

This proposition consequently differs in character, very essentially, from the four preceding ones, and as it is on its acceptance or rejection that the question of the possibility or impossibility of the revelation of a law-natural through nature essentially turns, it is necessary that we should consider it with scrupulous care.

If we assume the perfect character of the Creator to have been made known to us by a revelation, not through our nature, but to it, a science of jurisprudence may then be

<sup>1</sup> As to the distinction between our normal qualities and those which, as individuals, we actually exhibit in time and place, *see* Krause, p. 85:—

“Ich unterscheide mich selbst als ganzes Ich, ganz bestimmt von meiner individuellen Erscheinung des Lebens in der Zeit. Ich finde mich über mir selbst, sofern Ich diese zeitliche Person bin.” “I distinguish myself as a whole quite clearly from my individual manifestation as life in time. I find myself above myself, in so far as I am a temporal person.”

arrived at by a synthetic and deductive process, which does not start from a belief in the rectitude of human nature; for the known character of the lawgiver would, in this case, be a sufficient guarantee for the character of the law. The law would still be guaranteed to us, no doubt, but the guarantee would be external. It is on this, the theological hypothesis, that all theocracies rest; and if they can scarcely be said to be scientific, in the sense of resting on nature, they cannot be reproached with being illogical. But in so far as a knowledge of the duties which arise from our relation either to God or man is to be arrived at through nature, it is plain that its possibility rests on the reality of the dictum of consciousness which I have mentioned; because a nature that was self-condemned, though it might reveal a *necessary* law, could neither reveal a self-justifying law, nor afford ground for the inference of a self-justified lawgiver. It is at this point that the distinction between fatalism and obedience to self-accepted, though not self-imposed law, makes itself felt. The divine element in man—the relatively divine—recognises the validity of the law which the absolutely Divine imposes.

The ultimate test of the reality of this, as of every other dictum of consciousness is, of course, a subjective one—do we or do we not feel that our fundamental nature—our nature in its general and, in this sense, normal, as opposed to its special and exceptional impulses—is self-approving, and that the acts of which we instinctively disapprove are acts by which that nature is violated? Personally I should not hesitate to exclaim with St Augustine—"In his tribus nulla

nos falsitas verisimilis turbat,—et sumus, et nos esse novimus, et id (nostrum) esse ac nosse diligimus.”<sup>1</sup> Still we are not compelled on the penalty of contradiction to admit our qualities, as we are our being. We cannot think that we are not; but without violating the laws of thought, we may perhaps imagine that we were created by the devil, and formed originally in the image of the father of lies. Disbelief in Kosmos, or in man’s power of discovering it, would bring us, it is true, very near to the creed of the reformer who, in 1848, formulated the following project of a constitution: “Art. 1<sup>er</sup> et unique. *Il n’y a plus rien.*”<sup>2</sup> But Mr Mill has shown us that, in the form of scepticism at all events, it is an abyss from which even gifted men are not safe. As the admission of the dreary creed which it involves would amount to a denial of the possibility of natural jurisprudence altogether, the question whether or not it be, in point of fact, the response of humanity, is for us indeed a critical one. That it is not new in our day, but has prevailed, or recurred, under many modifications of irreligion and sensualism on the one hand, and fanaticism and asceticism on the other, both in heathen and Christian times,<sup>3</sup> is unquestionable; but the following trains of thought and tracks of inquiry, which I can only indicate, if duly carried out, I believe will convince you that the response of the general conscience, and consequently the central belief of mankind, has always been to the opposite effect.

<sup>1</sup> *Civitas Dei*, lib. xi. cap. xxvi.

<sup>2</sup> *Revue de Droit Interl.*, 1873, i. and ii. p. 320.

<sup>3</sup> Lecky, *History of Europ. Morals*, vol. i. p. 99.

## CHAPTER IV.

INQUIRY INTO THE HISTORY OF OPINION WITH REFERENCE  
TO HUMAN AUTONOMY.<sup>1</sup>

FOR the reasons stated at the end of last chapter, it seems proper that we should, for the present, stop short in our inquiry into the direct teaching of nature, and that I should invite you to test the accuracy of our last dictum, with the aid which I conceive the historical to be always in a condition to afford to the philosophical method.

As this is the first occasion on which we have resorted to the historical method, and as its relation to the philosophical method is frequently misunderstood, it may be well to assign the limits and indicate the modes of its application. And first, let me offer for your acceptance what I shall call—

(A) The canon of the limitation of the historical method.

We are not called upon, in the interests of science, to prove by an appeal to the consciousness of mankind any proposition which is self-evident—*i. e.*, which is guaranteed unequivocally to the individual mind by the laws of thought; or, in other words, we are scientifically entitled to assume that mankind always did believe what we ourselves must believe.

<sup>1</sup> The discussion in this chapter presents many analogies with that which Baron Bunsen has presented, with such wealth of thought and learning, in his *God in History*. Our theses, however, are not identical. His is to prove that there is a moral order in the universe—mine to prove that men feel themselves capable of discovering this order in their own relations.



No concurrence of objective opinion could give strength to our subjective opinion that twice two are four.

Xenophon tell us<sup>1</sup> that Socrates was wont to say that it was absurd to consult the gods about things that might be discovered by meditation; and in like manner, to the extent which this canon indicates, there can, I think, be no question that, in the pursuit of truth, the philosophical has no claim on the historical method. Reason is anterior to history; and where the testimony of reason is conclusive, history has nothing further to teach. It is on the ground that they rest on a deeper foundation than the historical, that we have assumed as facts the existence and independence of the Creator, and the existence and dependence of the creature.

At first sight it seems as if we might, with equal confidence, dispense with historical proof of human rectitude. If the necessity of the Divine nature be a sufficient guarantee for its perfection, why should the same necessity not carry the same guarantee as regards human nature? If the testimony of a single individual be a sufficient guarantee for the fact that a perfect God made man, why should the testimony of mankind, as a whole, be requisite to prove that He made him perfectly? The *a priori* method entitles us, I think, to dismiss, without inquiry, such an allegation as that in the Buddhist system, which is probably the creed of little short of a third of the human race, "There is not a trace of the idea of God,"<sup>2</sup>

<sup>1</sup> *Mem.* i. 1-7; iii. 9-14.

<sup>2</sup> "Il n'y a pas trace de l'idée de Dieu dans le Bouddhisme entière, ni au début ni au terme."—*Le Bouddha et sa Religion*, par J. Barthélemy Saint Hilaire, c. iv., 164, &c. See also Dr Goldstucker's article in *Chambers's Encyclopædia*, voce "Buddhist."

as a manifest misinterpretation;<sup>1</sup> and we do not hesitate, in virtue of the same method, to cut short all discussion as to our own existence with a summary *cogito ergo sum*. Why then should we not, with equal confidence, dismiss the notion that a perfect Creator produced an imperfect creature? The distinction arises from the contradictory phenomena which consciousness presents in the latter case. Here the mind itself forbids us to obey its own laws. It is as impossible for us to believe that we are perfect, as to see how a perfect God could have made us otherwise. Perfection and imperfection, good and evil, are irreconcilable phenomena of our nature, of the reality of each of which it is equally impossible to doubt, and which, if equally real, would neutralize each other. Neither can thus be shut out by the contradiction which threatens to exclude both, and to leave the mind void of any guiding principle, either right or wrong. In these circumstances, a far more delicate psychological investigation becomes requisite, and one which we can scarcely

<sup>1</sup> The misinterpretation seems to consist in an attempt to determine as a negation what is merely an indefinite acknowledgment of ignorance as to the nature or character of God, or of impotence to think a first, or uncaused, cause. All that the so-called atheism of the Buddhist thus amounts to is a recognition, not, of course very clearly or accurately expressed, that the infinite and uncreated is incognizable; or, in other words, that cognition is limited to the sphere of cause and effect, which is surely no great heresy. "The word Atheist," says Mr Alabaster, speaking of the Siamese, "is among us a word of reproach, and I do not like to apply it to those who, so far as I see, do not deny the existence of a God, but only reverentially abstain from defining that which it is impossible to comprehend." — *Wheel of the Law*, lii. Schlagintweit, *Buddhism in Thibet*, p. 108; Hardy, *Manual of Buddhism*, pp. 393-398, &c.; Max Müller's *Chips*, vol. i. p. 231, and p. 255, where he says, most truly, that such a religion as has been ascribed to Buddha could have existed only in a madhouse. See this subject more fully discussed, *infra*, p. 80, 85, *et seq.*

venture to confine within the limits of the individual mind. Admitting the reality of both phenomena, the question comes to be, whether they do, in our nature, so balance each other as to exclude the assertion of supremacy by either? or whether the one be not fundamental, involuntary, and determining: the other superinduced, and, to a great extent, voluntary and self-determined? Should the latter supposition be the correct one, humanity, though imperfect, will neither be necessarily anarchical nor heteronomous; and the possibility of a law-natural will be saved.

(B) The canon of the application of the historical method then comes to be this—

An appeal to the history of opinion becomes practically important in support of any proposition, the opposite of which the individual conscience is compelled to entertain, even partially. It is not, however, scientifically indispensable, because the individual mind might determine the preponderance. But as the general or universal cannot differ fundamentally from the individual consciousness, its testimony may be legitimately called in for purposes of exegesis, and as a means of widening the basis of our induction.

(C) The regulative canons for the application of the historical method again are—the laws of evidence applicable to historical inquiry.<sup>1</sup>

The investigation of the laws of evidence constitutes a branch of special jurisprudence which cannot receive adequate discussion in a treatise on general jurisprudence. All that I

<sup>1</sup> On this subject the best work, perhaps, in any language, is Sir G. C. Lewis's *Methods of Observation and Reasoning in Politics*.

shall attempt is to indicate one or two of those laws which have been most generally violated in dealing with anthropology from a historical point of view.

1st, Preference must be given to the best witnesses.

In virtue of this rule we may, without hesitation, confine our investigations almost exclusively—

(a) To the higher races of mankind.

(b) To the more vigorous periods of their moral, intellectual, and political life; and—

(c) To the more highly developed portion of each community, as represented by its more prominent individual members.

It is from forgetfulness of this rule that so many investigators of this problem have been led into fruitless attempts to determine the primitive beliefs of mankind in point of time, and the existing opinions of the non-historical races. Partly, indeed, the problem itself has been mistaken, and a confusion, similar to that between the law of nature in the scientific sense and the laws of the so-called "state of nature,"<sup>1</sup> has arisen between the fundamental, normal, and permanent beliefs which we seek, and beliefs which, as belonging to the earliest stage of social life, even if discoverable, would probably be abnormal, exceptional, and evanescent.

Much difference of opinion prevails not only as to the origin of life, but as to the condition in which mankind, as such, first appeared on the earth. In favour of the savage state we have the testimony of recent physiological investigation, which, to a certain class of minds, is altogether con-

<sup>1</sup> Introd., pp. 11, 12.

clusive. On the other hand, the science of comparative philology<sup>1</sup> has come to the aid of those old traditions of primitive civilization and subsequent prehistoric degeneracy, the universal prevalence of which was formerly conceived to settle the question in the opposite direction. Amongst the philosophers, too, in our own times, Schelling has appeared as the advocate of a sort of golden age, on the ground that it is inconceivable that man, as he now appears, should have been able of himself to raise himself from instinct to consciousness, from animality to rationality;<sup>2</sup> and Sir Alexander Grant, the learned Principal of the University of Edinburgh, in criticising the Darwinian hypothesis, has expressed his opinion that the higher races from the first, in addition to the human faculties which savages now exhibit, must have possessed "an inward impulse which led to the evolution of civilization." "The extremely unprogressive character of savage society," he says, "is an obstacle to believing that the first civilization of the world—that of the Aryan and Semitic races—can ever have taken its start from such a society, in primeval ages."<sup>3</sup>

Even putting aside all distinction, in kind, between the different races, there is, as it appears to me, nothing inadmissible, *a priori*, in the conjecture that barbarism may, for the first time, have resulted from causes similar to those which have so often occasioned retrogression in other times. We are so familiar with the phenomenon of continuous progress, or what we believe to be such, in modern times, that

<sup>1</sup> Max Müller's *Oxford Essays*, 1856, p. 5, and elsewhere.

<sup>2</sup> Schwegler, p. 303.

<sup>3</sup> Lecture to Edin. University Phil. Soc., April 6, 1871. May there not be Protoplasm and Protoplasm?



we put away from ourselves the thought even of temporary or partial retrogression almost as an impossibility. But is it certain that we are warranted in this comfortable conclusion? Anarchy is a phenomenon but too familiar to the historian; and not many generations of anarchy, if continuous, will, at any time, or in any race, bring about the total loss of civilization. Mexico has retrograded to a point below that which has been now attained by the Sandwich Islands; and it has at times seemed questionable whether the Latin civilization of Europe, with all the aids of material progress, will ultimately survive the disorganizing and demoralizing influences to which it is at present subjected, from democracy and consequent despotism on the one hand, and superstition and consequent infidelity on the other. Reactions, no doubt, continually occur; but it by no means follows that each reaction should reach the previous point of departure. Algeria has improved amazingly under French rule, and India, we trust, has done the same under our own. But no portion of the north coast of Africa has ever regained the point which it had reached in the days of Tertullian and Augustine; and the high tide of Hindu civilization left its mark in an age the remoteness of which even comparative philology hesitates to compute. The same may be said of the civilization of China; and the monuments discovered by the Spaniards in South America, when contrasted with the then existing institutions of the people, told a like tale of degeneracy. In 1794—towards the end of the “Reign of Terror”—we are told, matters in France had come to the pass that “at Meudon there was a tannery of human skins,—such of the guillotined as seemed worth flay-

ing,—of which perfectly good wash-leather was made, for breeches and other uses ;”<sup>1</sup> whilst the scalps of the women of the higher classes who were guillotined—their hair, from the preponderance of Frankish blood, being fairer than that of the common people—were in great demand as *perruques-blondes*.<sup>2</sup> A few months later we know that these horrors were at an end ; and that they were regarded at the time by the vast majority of French men and women in the same light as by the rest of civilized mankind cannot be doubted. But just as a whole private family is apt to suffer a moral degradation when a foul crime is committed by one of its members, so the subsequent history of France, and “the recent horrible episode of the Commune,”<sup>3</sup> afford too much reason to fear that she has not yet recovered from the influences of the “first Reign of Terror.” That by the union of liberty and order during a long course of years, she may wipe out the blood-stained pages of her horrible past, must be the hope of all, and, for the present, is the confident expectation of many.

But the question as to the condition of primitive mankind loses all real importance for our purpose when we consider that, just in proportion to the degree in which man at any period of his career, or from whatever cause, either as an individual or a race, approaches the condition of the lower animals, and recedes from that which is special to humanity, his value for the anthropologist diminishes, both as a specimen and a witness. Whatever be the qualities with which we are occu-

<sup>1</sup> Carlyle's *French Revolution*, vol. iii. pp. 209, 210.

<sup>2</sup> *Ib.* p. 209.

<sup>3</sup> See M. Renan's *Réforme Intellectuelle et Morale*, p. 56, one of the most remarkable political treatises in existence.

pied, it is in the highest and not the lowest specimens of the organism that we seek for their typical manifestation.<sup>1</sup> If we wish to ascertain the characteristics of animal life, we examine a man or a horse, and not a worm or a snail. And amongst men and horses, we select European men and Arabian horses, not Hottentots and Icelandic ponies. Viewed as a specimen, then, if the primitive man resembled a Bushman or an ape, or a spoonful of protoplasm, he would throw less light on the characteristics of humanity than our next-door neighbour.

Then, as to his opinion, consciously emitted; if we do not apply to savages or monkeys for our knowledge of physiology or zoology, why should we call them in to instruct us in psychology or anthropology? The whole nature of man probably exists in all men at all times, and the "intuition of Kosmos"<sup>2</sup> will, consequently, be wholly absent from none; but it is in the highest men at the highest times that nature exists in the greatest health and vigour, and it is there and then only that this intuition commonly manifests itself as a self-revealing power.

On the other hand, however, it is true that, as the characteristics of animal life are sometimes best exhibited by the phenomena of infancy and disease, so the study of the undeveloped and lapsed races of man may sometimes throw light

<sup>1</sup> "Quid illud? num dubitas, quin specimen naturæ capi debeat ex optimâ quâque naturâ?"—Cicero, *Tuscul. Quæst.* i. c. 14. Δεῖ δὲ σκοπεῖν ἐν τοῖς κατὰ φύσιν ἔχουσι μᾶλλον τὸ φύσει, καὶ μὴ ἐν τοῖς διεφθαρμένοις.—Aristot. *Polit.* i. c. ii. 10. Professor Bastian of Berlin has made a wonderful collection of the "abominations et les enfantillages" of savages. "Rechtsverhältnisse der verschiedenen Völker der Erde."—*Revue de Droit Interl.*, 1873, iii. p. 497. See also Maclellann's *Primitive Marriage*.

<sup>2</sup> Bunsen, *ut sup.* p. 56.

on his nature. Instruction may be derived from comparing them, not only with the higher phases of civilization, but with each other. The errors of a Red-Indian differ from those of a Red-Republican very widely; but they are about equally great, and the contrast which they offer is not without value for anthropological study. Nor are their analogies un instructive. The institutions of property and marriage, for example, are the two pillars on which civilization rests. The one supports it on its moral, the other on its material side; and to these two institutions they are equally opposed. The communistic savage has retrograded to the point which the polyandric savage had failed to pass. "*Le titre du contrat de mariage est abrogé*," was M. Emile Acolas's proposed amendment of the provisions of the Code Civil on that head. A Red-Indian could go no farther, and probably would not go so far. Still, as the child or the fool does not teach the man or the sage to the extent to which the man or the sage teaches the child and ought to teach the fool, so neither does pathology throw so much light on physiology or psychology as these throw on pathology. Our best instructors in anthropology will therefore be the higher races, and these races not only at the period of their highest endowment, culture, and organic life, but as represented by their sanest, most gifted, and most cultivated members. For our purposes, the single life of Socrates is of greater value than the whole existence of the negro race.

2d, Even amongst the witnesses whom we admit, the principle that *testimonia ponderanda sunt, non numeranda* must be applied.

The calling in of historical testimony at all, is an admission

that the case is one in which the value of numbers comes into play, and in which the rule holds good that, *ceteris paribus*, two witnesses are better than one. At the same time we must remember that it is the reality of a fact, and not the mere prevalence of an opinion, that is the ultimate object of our inquiry ; and that a fact can be ascertained only from those that know it. The vast majority of human beings, even of the higher races of mankind, would no doubt still be ready to swear that the sun goes round the earth ; but the fact has been ascertained to be otherwise by the testimony of a mere handful of witnesses. The fact in question with us here, though perhaps ascertainable without special culture, is scarcely ascertainable without special gifts, and is very far from being one with reference to which all men are equally in a condition to bear testimony.

3d, The abstract value of two witnesses being equal, the value of a coincidence between their testimony will increase in proportion to the dissimilarity, and diminish in proportion to the similarity, of the circumstances in which it is given. It is on this principle that the value of historical, as compared with contemporaneous testimony, chiefly rests. Very possibly our ancestors were no wiser than ourselves ; but the circumstances in which they thought and acted differed from ours more extensively than those of contemporaries, and hence the greater care with which we are willing to discuss their opinions. The effect is the same where the difference of circumstances arises from distance in space, in race, in social position, education, occupation, and the like, as in time. A coincidence of opinion between a Chinaman and an English-



man will do more towards establishing a fact, and a difference of opinion will do less towards invalidating it, than a similar coincidence, or difference, between an Englishman and a Scotchman.

Having indicated these rules for the application of the historical method to anthropological inquiries generally, our next duty is to determine whether the central creed of humanity has hitherto affirmed or denied the fundamental rectitude of man, and the consequent existence, in his nature, of a law for its guidance.

To answer this question must, to each of us, be the business of his life, rather than of any single spasmodic effort. Were I to profess to deal with it exhaustively within the limits of such a work as this, I should simply give proof of insensibility to its magnitude and its difficulty. All that I can do is to indicate its scope, and to signalize a few of the leading considerations which, to my own mind, notwithstanding all the sin and folly which we behold, and to which we contribute, appear to warrant an affirmative answer.

(A) *Of oriental, or ante-classical anthropology generally.*—The “old colossal religions of Asia,” as Neander called them,<sup>1</sup> fall mainly into two classes—those of the Shemitic, and those of the Aryan races.

(a) *The Shemitic races.*—As the religions of all the Shemitic races rest on direct revelation, real or pretended, and as they are not accompanied by independent rational or speculative systems, their anthropology is necessarily a reflex of their theology. The value of the former consequently depends on

<sup>1</sup> *Church History*, vol. ii. p. 6, Bohn's translation.

the authenticity of the latter. But as we admit the authenticity of one direct revelation only, and as all the others, if genuine, must have agreed with it, it follows that from this one we shall learn all that the Shemitic religions can teach us. The only Shemitic anthropological doctrine with which we need concern ourselves thus comes to be that contained in the Old Testament. The question whether this doctrine affirms or denies the radical soundness of humanity is of vital importance, not only in a religious, but in a scientific point of view, because it furnishes, when rightly understood, and taken in conjunction with the teaching of Christ and His apostles, the only external touchstone by which the accuracy of our natural interpretation of human nature can be tested. But as the religion of the Hebrews, in so far as it possesses any permanent value for humanity, forms a *unum quid* with Christianity, we shall defer the consideration of it till we speak of Christian anthropology.

Baron Bunsen regards the ancient Egyptians as a branch of the Shemitic race,<sup>1</sup> and their monuments as exhibiting the earliest form of Shemitic consciousness, ethical and religious. The point is one about which Egyptologists and philologists are not agreed, and on which I can presume to offer no opinion. As to the substance of their anthropological beliefs, enough appears to be known to warrant us in affirming that they embraced a direct relation between the human and divine, and that the character ascribed to the divinity Osiris<sup>2</sup> was beneficent. How they conceived themselves to have arrived at this creed is another question, the answer to which will prob-

<sup>1</sup> God in History, i. p. 223.

<sup>2</sup> P. 226.

ably very much depend on the race to which ethnologists may ultimately assign them.

The Phœnicians and Carthaginians have left no traces of anthropological or ethical speculation, and it is no doubt to the want of any rational conception of the human relations amongst them that we must ascribe the limited success which attended their efforts at political organization, notwithstanding their great commercial prosperity.

But it may seem that the above dictum requires some modification in favour of the Arabs, in virtue of the schools of philosophy which grew up under the Caliphs, and flourished more especially at Bokhara and Cordova. As regards such exceptional individuals as Avicenna and Averrhoes, and two or three others, this may very possibly be the case. In their study of logic and metaphysics they must have come in contact with spiritual laws, just as in their study of mathematics, natural history, and medicine, they came in contact with physical laws; and that these laws were not revealed in the Koran was a subject on which they can have harboured no delusion. It is even said that the two great men whose names I have mentioned were not by any means the slavish followers of Aristotle, but that they exhibited a good deal of mental independence. From the rational study of man in his relations, whether to God or to his fellow-men, however, they were shut out by the finality which they ascribed to the pretended revelations of the Prophet; and there is, besides, nothing in the facts of their external history to show that their ethnological genius carried them at all in the direction of that branch of science. The low conditions of their social and

political life, even in their best days, the barbarous character of their law of *status*, and the entire absence of cosmopolitan conceptions, are, in their case, just as in the case of the Phœnicians, conclusive proof of the little aptitude they possessed for tracing out the ethical laws, of which the life of the family, of the state, and of the community of nations, is the realization. As traders the Phœnicians were great, and of their law of contract, in so far as we know it, we must in justice speak in very different terms. But there never was, and there probably never will be, a political community of indigenous Shemitic growth, entitled to claim international recognition. The Jews are, of course, by far the ablest of the Shemitic races; but it is very doubtful whether a state capable of discharging international duties could be founded on the principles of Judaism, as distinguished from those of Christianity. It would not be so hopeless as a Mahometan state founded on the principles of the Koran; but an imperfect or incomplete external revelation, even if partially true, has a tendency to obscure the light of internal revelation, and to generate those exclusive conceptions by which Shemitic life has hitherto cut itself off from the stream of scientific progress. It is within their own horizon alone that human autonomy is plain to the Shemitic races, and that they recognize the reciprocity of rights and duties. Within that horizon, however, their ethical creed does not differ essentially from that of the rest of mankind; and so far as their testimony goes, it is in favour of human autonomy.

(b) *The Aryan or Indo-Germanic races.*—The popular religions of the Aryan races, like those of the Shemites, usually

lay claim to direct revelation, and consist mainly in traditions of external manifestations of divinity, and expressions of divine will. But they differ from them in one very important respect—viz., that this mythical and sensuous element does not stand alone, but appears to have been preceded, and is always accompanied, by what, if not a speculative, is at any rate a rational element, in the shape of a body of theological and ethical doctrines resting on a study, more or less accurate, of natural phenomena. In India this rational faith is known not only to have preceded the existing polytheistic mythology, but to characterize the original Vedic hymns themselves, as compared with subsequent portions of the Vedic literature which are represented as directly inspired.<sup>1</sup> “In many a hymn the author says plainly that he, or his friends, made it to please the gods.” As regards the sensuous polytheism of later times, in so far as it proceeded from the Aryan mind at all, and was not the result of contact with the inferior races, there is reason to believe that it was addressed entirely to the populace, and was intended to enforce and illustrate rather than to express the fundamental national belief. It is certain, at all events, that the preponderance of the sensuous, or the rational element, depended, not on their relation to each other in point of time, but on the stage of civilization at which the nation stood for the time being. As the Aryans of India degenerated, sensuism absorbed spiritualism, and the rational gave way to the mythical element;<sup>2</sup> as the Aryans of Greece

<sup>1</sup> Max Müller's *Ancient Sanscrit Literature*, chap. i. 19.

<sup>2</sup> See Professor Roth's theory of the supersession of the worship of Varuna by that of Indra, as stated by Dr Muir—*Sanskrit Texts*, vol. v. p. 116.



advanced, the process was reversed — spiritualism absorbed sensuism, and myths and mysticism alike gave way before the influence of reason.

Great obscurity rests on the relation in which the eastern and western branches of the Aryan race stood to each other during the long period<sup>1</sup> which elapsed between their separation and the commencement of the history of the classical nations.<sup>2</sup> There was a tradition that Pythagoras visited the East, and even India. But the existence of any real connection between Eastern and Western thought, previous to Alexander's expedition, scarcely admits of proof from classical sources; and it is to that noble phalanx of oriental scholars, whose labours form perhaps the most remarkable phenomenon in the whole annals of learning, that we are indebted for our knowledge of the fact that the rational creed of Socrates and Plato had its historical prototype in that of the Veda, the Zend-Avesta, and the Dhammapada, rather than in that of Homer. It is in these remarkable monuments of the earliest forms of Aryan meditation, and not in the popular beliefs of later ages, whether in the East or the West, that we must look for partial anticipations of the ultimate results of Greek thought and Christian teaching. In this rational element, which as an undercurrent never altogether disappears from the Aryan religions, we have an expression of human consciousness which we miss in the religions of the Shemitic

<sup>1</sup> *Ib.* i. pp. 2-4, 2d ed., and v. p. 2.

<sup>2</sup> Professor Benfey of Göttingen has called in question the theory of the Eastern home, and has maintained the greater antiquity of the Aryans of the north of Europe; and Professor Max Müller, in his lecture at Strassburg, has recognized it as an open question—*Contemporary Review*, June 1872.

racess; and for this reason it is to those who were our own progenitors in the flesh, and with whom as a nation we have been so singularly reunited, and not to the kindred of those who were chosen to be the channel of direct revelation, that we have to look for the roots, not only of the languages which we speak, but of the theological and anthropological beliefs on which our natural religion, our ethics and jurisprudence, and even the external framework of our social and political life depends.<sup>1</sup> And if it is to this rationalistic element in the Aryan mind, as manifested by its Eastern representatives, that we must look for instruction as to our own past, it is on it that we must work if we would influence their future. The missionary who can appeal to it will find no want of that sympathy, the lack of which impedes the progress of his brother who seeks to inculcate dogma, or to institute ritualistic observances.

*1st, The original Aryan family.—The Aryan family, before their separation, believed in a Creator whose character they accepted as the standard of rectitude, and they ascribed to humanity, as represented by themselves, a fundamental nature in accordance with that character.*

I am not myself an oriental scholar, and I must therefore be contented to establish this proposition by referring you to a few expressions of opinion by those who are. I shall be careful, however, that these expressions be, as far as possible,

<sup>1</sup> A very powerful argument in favour of the views of those who are endeavouring to remove the obstructions with which the pedantry of last century has barricaded the approaches to the two classical languages, is furnished by the fact that, in place of abandoning Greek and Latin, our sons will now have to add Sanscrit to the studies of a learned education.

both trustworthy and unequivocal. On both grounds it will, I believe, be admitted that precedence is due to the opinion of Professor Max Müller, not as an oriental scholar alone, but as a man of vast general culture, great depth of sympathetic insight into human character, and whose open and dispassionate temper enables him to preserve the happy critical medium between credulity on the one hand and scepticism on the other.

“Dieu,” said Mirabeau, “est aussi nécessaire que la liberté ;” and in his *History of Ancient Sanscrit Literature* (p. 528) Max Müller thus expresses himself :—

“We look in vain for the effect produced on the human mind by the first rising of the idea of God. To the poets of the Veda that idea is an old and familiar idea : it is understood, never questioned, never denied.” In proof of this “monotheism of the Aryan nations,” he adduces many passages, both in the earlier and the later Vedic hymns. From these passages it is apparent that a monotheistic conception not only preceded, but all along accompanied, the polytheistic mythology. “There is,” he says, “a monotheism that precedes the polytheism of the Veda, and even in the invocations of their innumerable gods, the remembrance of a god, one and infinite, breaks through the mist of idolatrous phraseology, like the blue sky that is hidden by passing clouds” (p. 559). The different divinities were but the various aspects in which the One self-existent presented Himself, and hence the ascription to each of them in succession of the whole of His attributes. Such, indeed, is the explanation of them which is given expressly in some of the hymns. “They call (Him) Indra, Mitra, Varuna, Agni ; then He is the well-winged

heavenly Garutmat; that which is One, the wise call it many ways—they call it Agni, Yama, Mâtariśvan” (p. 567). In another hymn, also falling within the ancient period, the same belief is even more definitely expressed: “He who gives life, He who gives strength, whose blessing all the bright gods desire; He who is God above all gods.”<sup>1</sup>

Nor does this primitive belief appear ever to have been abandoned. The Puranas are the main source of the existing popular creed of the Hindus. They are little better than a caricature of the ancient theology; and yet a learned Hindu of Benares, in a lecture delivered before an English and native audience, indignantly repudiates the charge of polytheism, on the ground that there are “thousands of texts in the Puranas, declaring, in clear and unmistakable terms, that there is but one God, who manifests Himself as Brahma, Vishnu, and Rudra (Siva), in His function of creation, preservation, and destruction. In support of these statements, this eloquent advocate quotes numerous passages from the sacred literature of the Brahmans, and he sums up his view of the three manifestations of the Deity, in the words of their great poet Kalidâsa, as translated by Mr Griffith—

“ In those Three Persons, the One God was shown,  
Each First in place, each Last,—not one alone;  
Of Siva, Vishnu, Brahma, each may be  
First, second, third, among the Blessed Three.”<sup>2</sup>

Nor has this doctrine disappeared from the popular creed, even at the present day. Mr Hunter tells us, in his *Annals*

<sup>1</sup> P. 569. Quoted also by Bunsen, *God in History*, vol. i. p. 303.

<sup>2</sup> *Chips*, preface, xviii.

of *Rural Bengal* (p. 116), that "The modern pundit's reply to the missionary who accuses him of polytheism is: Oh, these are only various manifestations of the One God; the same as, though the sun be one in the heavens, yet he appears in multi-form reflections upon the lake. The various sects are only different entrances to the one city."<sup>1</sup> Whatever an Arian or a Socinian might say to such a creed, it will scarcely do for a people who repeat the Athanasian Creed in their churches to accuse its holders of polytheism!

The charge of dualism, on the ground that it is traceable in the Persian branch of the Aryan family, seems equally to melt away before closer inspection. There can, I imagine, be no doubt that, as Baron Bunsen asserts, the appearance of this doctrine, to the extent to which it did appear, is to be regarded simply as an evidence, not of the abandonment of monotheism, but of the superseding of the worship of external nature by an ethical faith. "The antagonisms of light and darkness, of sunshine and storm, became transformed into antagonisms of good and evil, of powers exerting a beneficent or corrupting influence on the mind."<sup>2</sup> But the question for us is as to the relative position ascribed to these powers—were they equals? or, if not, which of them exercised supremacy over the other? On these points Bunsen has no hesitation; but lest in his case you should imagine, from his thesis being substantially my own, that the wish were father to the fact, I shall call, in preference even to Müller,<sup>3</sup> another witness from another nation.

<sup>1</sup> *Chips*, p. 116.

<sup>2</sup> *God in History*, vol. i. p. 273.

<sup>3</sup> For whose opinion see *Chips*, vol. i. p. 140, 155, 173.



"It is very certain," says the Comte de Gobineau,<sup>1</sup> "that from the first period, when the Aryans still inhabited Aryana-Vaëja, they had formed the conception that the cause of all impurity, of all obscurity, of all evil, lurked in the essence of a perverse spirit, which it was their duty to combat and resist at any price. There is nothing to show that that perverse spirit was then considered as equal in power to the Eternal Light to which they paid their adorations. The Aryans did not profess dualism. No trace of that dogma is to be found in the Gathas, the most ancient parts of the Avesta: the Vedas give no indication of it: the primitive Greeks knew nothing of it: nothing resembling it has been discovered either among the ancient Scythians or the later Scandinavians. Evil exists, unquestionably, in the form of incessant protest and revolt against the supreme Divinity. But this Divinity rules alone, secure of final victory, and master of all things in the immensity of His creations."

I am aware that there is a class of Sanscrit scholars by whom a belief in the unity of God, in the earliest period, is contested on the ground that it first appears in the Brahmanas and Upanishads. To a limited extent this view claims the sanction of the distinguished name of Dr Muir, who has treated the subject, in the fifth volume of his *Sanskrit Texts*,<sup>2</sup> with his usual caution and moderation; and it has been maintained in several able articles by Mr Fairbairn in the *Contemporary Review*. I cannot, of course, discuss either the authenticity or the antiquity of Sanscrit texts with

<sup>1</sup> *Histoire des Perses*, par le Comte de Gobineau, vol. i. p. 40.

<sup>2</sup> Sect. xxi. p. 350.

Sanskrit scholars. The fact of the existence of passages in which the unity of God is directly asserted being confined to the more recent portions of the Vedic literature may, or may not, admit of the explanation which Max Müller has given of it<sup>1</sup>—viz., that many of the verses in which such expressions occur, though incorporated in the Upanishads, can be traced to their original places in the Rig-Veda Sanhitâ.

But there is another ground, which I have already partially explained,<sup>2</sup> on which I believe in the monotheism not of the Aryan race in particular, but of mankind in general, and which seems to me to remove the question from the category of things which are open to historical discussion, and to force upon us a recurrence to the psychological method. The idea of unity I hold to be involved in that of causality, and, like it, to be a necessary idea, the existence of which, in virtue of the canon of limitation,<sup>3</sup> may be taken for granted, at all times and in all places. But in this connection we are not called upon to discuss the existence or non-existence of necessary, and as such, innate ideas; for whether original or acquired, the presence of the idea of number in the mind of the worshipper is assumed by the advocate of polytheism. He has further assumed the idea of God. We have thus both number and causality given us—in plurality—many Gods. Man, for anything I assert, may be incapable of either idea prior to experience. But here he has them both already given. Now, whatever be the subject to which the formal idea of number is applied, it is, as Pythagoras asserted, and as Hegel has

<sup>1</sup> *Sanskrit Lit.*, p. 567.

<sup>2</sup> *Ante*, p. 63.

<sup>3</sup> Pp. 63, 64.

shown in his logic,<sup>1</sup> manifestly impossible to think *two*—*i.e.*, *two ones*—till we have thought *one*—*i.e.*, *one one*. But this One one, which we must begin with, is the common starting-point of thought and of existence,<sup>2</sup> and as such, is necessarily exclusive of all others. To think of two is always to think of one twice over; and as thinking takes place in time, one of the thoughts must have preceded the other, in which case the latter loses its assumed significance. A second cause—*i.e.*, a second first cause—is a contradiction in terms. But a dualist, or a polytheist (in the sense of a believer in two or more *primary* Gods), is supposed to think of two ones, or of many ones, firsts, or causes, before he thought of one. The idea of unity is thus at once ascribed to him and denied to him; or, in other words, he is credited with thinking twice, or oftener, what he never thought at all. Dr Muir's error, as it appears to me, consists in assuming that in thinking of God as one, we form an abstract conception of Deity.<sup>3</sup> But abstraction implies the existence of that from which we abstract, and cannot, consequently, be the starting-point either of thought or existence. An abstract conception is a result of reasoning at which it may be that the Aryan nations, at this stage of their history, were incapable of arriving. But the idea of unity is not a result, but a condition of reasoning, an ultimate datum of consciousness which is inseparable from intelligent existence, and must have existed in men at the beginning, just as much as at any subsequent stage of their historical life. And

<sup>1</sup> Schwegler's *Hist. of Philos.* by Stirling, p. 325.

<sup>2</sup> "That one breathed calmly, self-supported; there was nothing different from, or above it."—Muir, *Sanskrit Texts*, vol. v. p. 357.

<sup>3</sup> *Ib.* p. 351.

in this case, besides, Dr Muir has assumed it, because he has taken for granted that mankind not only got the length of it, but got beyond it.

Professor Max Müller has adopted this view with one breath, but he appears to have rejected it with the next in virtue of a distinction which I cannot see to be more than verbal. "It is too often forgotten," he says, "by those who believe that a polytheistic worship was the most natural unfolding of religious life, that polytheism must everywhere have been preceded by a more or less conscious theism. In no language does the plural exist before the singular. No human mind could have conceived the idea of Gods without having previously conceived the idea of a God. It would be, however, quite as great a mistake to imagine, because the idea of a God must exist previously to that of Gods, that therefore a belief in one God preceded, everywhere, the belief in many Gods. A belief in God as exclusively *One*, involves a distinct negation of more than one God, and that negation is possible only after the conception, whether real or imaginary, of many Gods."

"The primitive intuition of the Godhead is neither monotheistic nor polytheistic, and it finds its most natural expression in the simplest and yet most important article of faith that God is God. This must have been the faith of the ancestors of mankind previously to any division of race or confusion of tongues. It might seem, indeed, as if in such a faith the oneness of God, though not expressly asserted, was implied, and that it existed, though latent, in the first revelation of God. History, however, proves that the question of

oneness was yet undecided in that primitive faith, and that the intuition of God was not yet secured against the illusions of a double vision. There are in reality two kinds of oneness which, when we enter into metaphysical discussions, must be carefully distinguished, and which for practical purposes are well kept separate by the definite and indefinite articles. There is one kind of oneness which does not exclude the idea of plurality; there is another which does. When we say that Cromwell was a Protector of England, we do not assert that he was the only protector. But if we say that he was the Protector of England, it is understood that he was the only man who bore that title. If, therefore, an expression had been given to that primitive intuition of the Deity, which is the mainspring of all later religion, it would have been 'There is a God,' but not yet, 'There is but One God.' The latter form of faith, the belief in One God, is properly called monotheism; whereas the term of henotheism would best express the faith in a single God." <sup>1</sup>

My reply to this train of reasoning and illustration is, that it is wholly inapplicable to ultimate causality, of which the *essence* is priority. One *cause* excludes all other causes, whether simultaneous or subsequent. The intuition of a God, of which Professor Müller speaks, is an intuition not of a secondary cause which is also a result, but of a *first* cause, for it is this conception alone which is intuitive, or, in other words, which is forced on the mind by its own laws. A secondary cause is always a contingency. There need not be a *secondary* cause for a phenomenon, because the primary cause

<sup>1</sup> *Chilps*, i. 353-356.



may have acted directly. But there *must* be a first cause. Simultaneity of creation is quite conceivable, the Creator being there. God could have created two Cromwells at the same time. The English Commonwealth might have chosen two Protectors by a single vote, as the Roman Senate chose two Consuls. Duality might have belonged to the idea; but simultaneity of *ultimate* creative power (and no power is creative which is not itself ultimate) is inconceivable. The idea of it could not have arisen, and we are entitled to assume, never did dwell in any sane mind, either savage or civilized, either consciously or unconsciously. There must, then, be a first cause. Further, inasmuch as *two firsts* is a contradiction in terms, the assumption of a God (or one *first* cause) is, *eo ipso*, a negation of any other God (or second-first cause). In order to make room for the second-first cause, the first-first cause must be *removed*. But its removal could take place only by its own instrumentality. We have thus to take it for granted in order to get rid of it; and in getting rid of it we are still left with it, because the cause which removed it immediately becomes the first. It may be quite true that the idea of one *necessitates* the idea of two; but that is of no consequence so long as it is certain that the idea of two *presupposes* the idea of one. That there is "*one* kind of oneness which does not *exclude* the idea of plurality" is, therefore, nothing to the purpose; because I am willing to go the length of admitting that *every* kind of oneness *includes* the idea of plurality in the sense of necessitating it. But the *subsequent* admission of plurality, whether contingent or necessary, can be of no avail in the question of priority, *after* unity has

already been assumed. As regards the precedence, if not the necessity of its existence, then, the Pythagoreans were unquestionably right in placing the *One*—the Undivided, the Eternal—in antithesis to all other numerals.<sup>1</sup>

It must have been the misleading influence of his philosophical illustration which induced so clear-headed a man as Professor Müller, on this occasion, to argue himself out of what, plainly, is his own general view. Probably, too, he may have felt that, if we carry this mode of reasoning beyond the point at which it guarantees the existence of a single cause, it may become, as St Anselm suspected, a temptation from Satan.<sup>2</sup> The cognition of the absolute may be the "Forbidden Fruit." For my own part, however, I conceive the intuition of the single starting-point of existence to be the ultimate, though hidden factor, in the conception of divinity.<sup>3</sup>

But for our knowledge of the character of the cause of our being, and, consequently, of our being itself—of the fact that God is a righteous and beneficent God, and that His creation is "very good,"—we must appeal not to the laws of thought alone or specially, but to Kosmos as a whole; and here no one can accept more gladly than I do the teaching of the historical school.<sup>4</sup>

<sup>1</sup> Bunsen, vol. ii. p. 95; where will be found an interesting and intelligible account of the Pythagorean Pentagram.

<sup>2</sup> Neander, vol. viii. p. 123.

<sup>3</sup> See the opposite view by the Rev. A. M. Fairbairn, in his Essay on the "Idea of God," *Contemporary Review*, Oct. 1871. I had not the benefit of hearing Principal Fairbairn's "Muir Lectures" delivered in the University of Edinburgh this winter, and what I have said here has reference only to his published writings (1880).

<sup>4</sup> It has been said that in using this argument from number, I appeal to a form

The question, then, as we have already seen, which it concerns us to establish historically, is not the number but the character which man has ascribed to the Single Source of his being, and as a necessary consequence to his being itself. As bearing on this point, the absence of dualism, in the sense of *equality* of powers, and the preponderance assigned to the power of light and life over the power of darkness and death, in the earliest period, is of exceeding interest and importance.

So far as we have any means of judging, it would seem

of reasoning which is applicable only to the exact sciences. But those who speak of polytheism surely bring the subject into this region more decidedly than those who speak of monotheism. I don't say whether or not a savage may be capable of thinking numerically at all. Those who are acquainted with him tell me that he is able only to think *five*. But if he thinks five, he must have thought *one* first; and if he thought one *cause* first, he excluded all other causes, and thus thought one God. He came into the sphere of the "exact sciences" of his own accord without my assistance, and there can be no reasonable question that "to suppose plurality is to suppose unity already given." This subject is very ably discussed in Ferrier's *Institute of Metaphysic*, p. 88. It is in the sphere of metaphysics, behind and beyond that which either Müller or Fairbairn has touched, that the difficulty as to the starting-point of thought and existence really lies. As Pythagoras pointed out, unity and plurality, in the absolute sense, are equally inconceivable; because unity implies divisibility, and divisibility implies unity. All that this time-honoured subtilty amounts to, however, is a proof of the limitation of human intelligence. We must start with *a* postulate; but it is not necessary to start with two, still less with many. We can refuse them, one after another, till we reach the last; but to refuse it is to subscribe to the dialectic of Gorgias, and to accept his demonstration that "nothing exists"—Article 1<sup>er</sup> *et unique*—Il n'y a plus rien. Unity and divisibility go together. But even in this case unity has the best of it, for as it came first it stays longest. As there could be no division till there was something to divide, so there can be no division when there is nothing to divide. Divisibility thus rests on the assumption of the undivided, and reduces substance to unity by a necessity similar to that which we recognized in the case of causation. What remains to us and defies all analysis, is one cause and one effect—subject and object, mind and matter. V. Grant's *Arist.*, p. 138, and pp. 290-328 and 440. That both Plato and Aristotle regarded the assumption of unity as the only refuge from absolute scepticism is beyond question.

that the original Aryan family believed not only in the purity of the Source of being, but in the beneficence of its manifestations in the work of creation.<sup>1</sup> The most satisfactory evidence on this point consists in the earliest conceptions of Deity which they exhibit in their new abodes, of which I shall have occasion to speak presently. But with reference to the character which they assigned to humanity even in their original dwelling-place, we derive from the science of comparative philology direct evidence of a very curious and satisfactory kind. From this source we have unequivocal testimony to the fact, that the duties which relatives were supposed by our earliest progenitors to discharge to each other, within the domestic circle, very closely resembled those which we ourselves assign to them.

“The mere fact that the names for *father, mother, brother, sister, daughter*, are the same in most of the Aryan languages, might at first sight seem of immaterial significance, yet even these words are full of import.<sup>2</sup> That the name of father was coined at that early period, shows that the father acknowledged the offspring of his wife as his own, for thus only had he a right to claim the title of father. Father is derived from a root, *pa*, which means, not to beget, but to protect, to support, to nourish. The father as genitor, was called in Sanscrit *ganitas*; as protector, or supporter of his offspring, he was called *pitâr*. Hence, in the Veda, these two names are used together, in order to express the full idea of father. Thus, the poet says (i. 168, 33)—

<sup>1</sup> Müller's *Ancient Sans. Lit.*, pp. 527, 559, 568, 569, &c.

<sup>2</sup> Max Müller's *Essay on Comparative Mythology*. Oxford Essays, 1856.



Dyaús me pitâ ganitâ <sup>1</sup>  
 Jupiter mei pater genitor  
 Ζεὺς ἐμοῦ πατὴρ γενετήρ.

In similar manner *mâtar*, mother, is joined with *ganitrê*, *genitrix* (Rv. iii, 48, 2), which shows that the word *mâtar* must soon have lost its etymological meaning, and have become an expression of respect and endearment. For among the early Aryans *mâtar* had the meaning of maker, from *ma*, to fashion; and in this sense, and with the same accent as the Greek *μήτηρ*, *mâtar*, not yet determined by a feminine affix, is used in the Veda as a masculine. . . . The natural relation between brother and sister had been hallowed at that early period, and it had been sanctioned by names which had become traditional before the Aryan family broke up into different colonies. The original meaning of *bhrâtar* seems to have been he who carries or assists; of *vasar*, she who pleases or consoles—*svasti* meaning, in Sanscrit, joy or happiness. In *duhitar*, again, we find a name which must have become traditional long before the separation took place. It is a name identically the same in all the dialects, except Latin, and yet Sanscrit alone could have preserved a consciousness of its appellative power. *Duhitar*, as Professor Lassen has shown, is derived from *duh*, a root which, in Sanscrit, means to milk. It is, perhaps, the Latin *dūco*, and the transition of meaning would be the same as between *trahere*, to draw, and *traire*, to milk. Now the name of milkmaid, given to the daughter of the house, opens before our eyes a little idyl of the poetical and pastoral life of the early Aryans. One of the few things by which the

<sup>1</sup> Jove, my paternal genitor.



daughter, before she was married, might make herself useful in a nomadic household, was the milking of the cattle; and it discloses a kind of delicacy and humour, even in the rudest state of society, if we imagine a father calling his daughter his little milkmaid, rather than *Sutâ*, his begotten, or *filia*, the suckling. This meaning, however, must have been forgotten long before the Aryans separated. *Duhitar* was then no longer a nickname, but it had become a technical term, or, so to say, the proper name for daughter.”<sup>1</sup>

So much for that “veiled life,” before which, as Baron Bunsen says, when we read the Veda, “we stand in a similar position to that which we should occupy with regard to the unfolding of the Hebrew mind from the age of Abraham to that of Jeremiah, if we possessed nothing but the Book of Psalms.”<sup>2</sup> Let us now look into that period with reference to which the testimony of the Veda is direct.

2*d*, *The Eastern, or Indian Branch*.—After their separation, the branch of the Aryan family which migrated towards the East, carried with them, into their new abodes, their ancient faith both in God and man.

Whatever be the date of the earlier hymns of the Veda in point of time, there can be no doubt that they carry us back to the earliest settlement of the Aryan race in India, which probably took place several centuries before the date of Zoroaster.<sup>3</sup>

Now the character ascribed to the elementary powers whom the Aryans of India worshipped, or, more correctly speaking,

<sup>1</sup> P. 17.

<sup>2</sup> P. 298.

<sup>3</sup> Bunsen, *ut sup.*, vol. i. p. 298.

to the various forms of manifestation under which they worshipped the One Power, is a beneficent character.

“ O God of gods, Thou art to me  
A father, mother, kinsmen, friends ;  
I knowledge, riches, find in Thee ;  
All good Thy being comprehends.” <sup>1</sup>

Whether the special object of adoration, for the time being, be Indra, or Varuna, or Agni, or Ushias, the permanent sentiment is still, that “ God is love.”

“ Thou, Indra, art a friend, a brother,  
A kinsman dear, a father, mother ;  
Though thou hast troops of friends, yet we  
Can boast no other friend but thee.  
With this our hymn thy skirt we grasp,  
As boys their fathers’ garments clasp ;  
Our ardent prayers thy form embrace,  
As women’s arms their lords enlace,  
They round thee cling with gentle force,  
Like saddle-girth around a horse.” <sup>2</sup>

Even when Indra appears in the character of the Thunderer, it is in behalf of mankind that his terrors are displayed, and his bolts are hurled ; and in his conflict with Vitra, the demon of drought, the victory remains with the life-giving power.<sup>3</sup>

<sup>1</sup> *Dr Muir’s Metrical Translations from Sanscrit Writers*, p. 2. This very interesting and instructive volume is a collection of translations which Dr Muir had published in various forms from time to time, and from which the passages in the former edition of this work were selected. In its present shape it contains prose translations by which the accuracy of the metrical translations may be tested even by those who cannot refer to the originals, and ample references to corresponding passages in Greek and Roman writers and in the Holy Scriptures. The work is of great interest and importance, as showing the universally human character of much of which we have been accustomed to regard as exclusively Christian.

<sup>2</sup> *Ib.* p. 171.

<sup>3</sup> *Muir’s Sanskrit Texts*, p. 174.

The blue expanse of heaven was apparently the manifestation of the Divine which first became an object of worship; and it is to Varuna "the Surrounders," whom philologists have identified with the Greek *Oûpanós*, one of the offspring of Aditi, the God of Space, that the character of omniscience is especially ascribed. "No one rules for the twinkling of an eye apart from him."

"Two think they are not overheard,  
Who sit and plot as if alone;  
Their fancied secrets all are known—  
Unseen, the god is there, a third."

But Varuna is not an object of suspicion—he is a terror only to evil-doers.

"He marks the good and ill within  
The hearts of men—the false and true  
Discerns with never-erring view;  
He hates deceit, chastises sin.  
His viewless bonds, than cords and gyves  
More hard to burst, the wicked bend  
In vain, within their folds confined,  
To cast them off the sinner strives.  
And yet the god will not refuse  
His grace to one who inly moans,  
When, fetter-bound, his errors owns,  
And for forgiveness meekly sues."<sup>1</sup>

In like manner it is in his beneficent aspects that Agni (Ignis), the God of Fire, presents himself, as one at the sight of whose daily return, "both heaven and earth, and gods and men rejoice."

"In every house thou art a welcome guest,  
The household's tutelary lord, a son,  
A father, mother, brother, all in one;  
A friend by whom thy faithful friends are blest."<sup>2</sup>

<sup>1</sup> Pp. 161, 162.

P. 184.

And Ushias—the Dawn—is represented as a beautiful bride decked for her husband—

“Thou sweetly smilest, goddess fair,  
 Disclosing all thy youthful grace,  
 Thy bosom bright, thy radiant face,  
 And lustre of thy golden hair.”<sup>1</sup>

\* \* \* \* \*

“Bright goddess, let thy genial rays  
 To us bring stores of envied wealth  
 In kine and steeds, and sons, with health,  
 And joy of heart, and length of days.”<sup>2</sup>

After the character ascribed to Deity, the point next in importance in the Hindu creed is the relation between the Divine Essence and the human soul. This relation the Oriental Aryans held to be of the most intimate kind.

“When Brahmā framed the world of men,  
 He made it all Brahmanic then.  
 By no distinction marked of class,  
 They formed one homogeneous mass.

But when in time they showed diverse  
 And widely varying characters,  
 Those men whose natures were the same,  
 Conjoined received a separate name.”<sup>3</sup>

The life of humanity as a whole, like the life of every individual man, they regarded as a starting from, and progressing towards, the Divine life. “The highest object of their religion,” says Müller, “was to restore that bond by which their own self (âtman) was linked to the Eternal Self (paramâtman); to recover that unity which had been clouded and obscured by the magical illusions of reality by the

<sup>1</sup> P. 180.

<sup>2</sup> P. 183.

<sup>3</sup> P. 66.

so-called Mâyâ of creation.”<sup>1</sup> And again, “A Hindu speaking of himself, spoke also, though unconsciously, of the soul of the universe, and to know himself was to him to know both his own self and the Universal Self, or to know himself in the Divine Self. The Sanscrit ‘atmânâ âtmanâ pasya’—see (thy) self by (thy) self—had a deeper signification than the Greek γνῶθι σεαυτὸν, because it has not only a moral, but also a metaphysical meaning.”<sup>2</sup> I should scarcely be disposed to say that the Greek γνῶθι σεαυτὸν was destitute of metaphysical significance even at the first, and ultimately it was discovered to have no lack of it. But even seen exclusively in its moral aspect, the recurrence of such a maxim, *semper ubique, et ab omnibus*, would alone go far to establish our present thesis. Of the fact that it is neither a Greek nor a Sanscrit, but a human maxim, we have a striking indication in its existence in China.<sup>3</sup> And here is a dialogue to the same effect between a husband and a wife.

WIFE.—“What my Lord knoweth (of immortality) may he tell that to me.”

HUSBAND.—“Thou who art truly dear to me, thou speakest dear words. Sit down, I will explain it to thee, and listen well to what I say.” And he said, “A husband is loved, not because you love the husband, but because you love (in him) the Divine Spirit. A wife is loved, not because we love the wife, but because we love (in her) the Divine Spirit. Children

<sup>1</sup> *Sanskrit Lit.*, p. 19. See also some interesting passages from the Bhagavad Gîtâ, quoted in the Introduction to Dr Muir's *Metrical Translations from Sanscrit Writers*, p. xvi, &c.

<sup>2</sup> Pp. 21, 22.

<sup>3</sup> Bunsen, vol. i. p. 208.



are loved, not because we love the children, but because we love the Divine Spirit in them.”<sup>1</sup>

“It was surely,” says Müller, “the logical result of such a creed, that the Hindus should recognize law and virtue, as we see in their sacred poetry, as well as in their codes of law.”<sup>2</sup>

A very interesting indication of the Hindu conception of humanity, to which sufficient importance seems scarcely to have been attached, is furnished by a single word,—the name given to the author of, or, more correctly speaking, the source assigned to, their most renowned law-book. Manu, we are now told by all the authorities, does not mean a man, but Man in the abstract. The “laws of Manu,” consequently, do not profess to be a code or system of law revealed to a particular man, like the laws of Moses or Mahomet, but bear on the face of them to be the laws of mankind, or, in other words, the laws which man’s nature teaches him.

Sir William Jones, in the preface to his translation of the *Laws of Manu*, identifies Manu with Adam. Subsequent investigations do not seem to indicate any linguistic affinity between the epithets; but the idea of an earth-born son of God was certainly common to them, and St Paul carries out the same conception when he speaks of Christ as the “second man”<sup>3</sup> and “the last Adam.”<sup>4</sup>

In his *Sanskrit Texts*,<sup>5</sup> and in a paper which he contributed to the *Journal of the Royal Asiatic Society* in 1862,

<sup>1</sup> *Sanskrit Lit.*, p. 23.

<sup>2</sup> *Ib.* p. 26.

<sup>3</sup> Rom. v.

<sup>4</sup> 1 Cor. xv.

<sup>5</sup> Vol. i. p. 161, 2d edition.

p. 406, Dr Muir has abundantly shown that the Aryan Indians, if not the whole Aryan race, regarded Manu at once as their earthly progenitor, and as the link by which their own nature and the Divine nature were united. That the use of the word, in the sense thus attached to it, was not confined to India, but extended, at all events, to the branches of the Aryan family to which we ourselves belong, is proved by the statement of Tacitus, that the ancient Germans worshipped Mannus, the son of Tuisco, their primary divinity, as the human founder of their race.

"It has been remarked," says Dr Muir, "by various authors (as Kuhn, *Zeitschrift*, iv. 94 f.), that in analogy with Manu, or Manush, as the father of mankind, or of the Aryyas, German mythology recognizes Mannus as the ancestor of the Teutons. Tacitus says,<sup>1</sup> 'Celebrant carminibus antiquis Tuisconem deum terrâ editum, et filium *Mannum*, originem gentis conditoresque. Manno tres filios adsignant, &c.'"

The English "man" and the German "Mann," appear also to be akin to the word *manu*; and the German "Mensch" presents a close resemblance to "Manush."<sup>2</sup>

The subject seems to merit, if it has not already received, further investigation at the hands of the learned.

In carrying with them the word, the Teutonic settlers in our own country did not fail to carry with them the tradition which it indicated to their ancestors. A very curious instance of this occurs in one of the earliest of our vernacular poets. It has been remarked by Dean Milman that the author of *Piers Ploughman*, in the original form of the poem as it

<sup>1</sup> *Germania*, 2.

<sup>2</sup> *Journal of the Asiatic Society*, *ut sup.*, p. 430.

appears in text A, represents Piers as "merely the highest type of the honest small farmer, whose practical justice and Christianity were so approved by Truth (who is the same with God the Father), that he is intrusted with a Bull of Pardon of more value than even the Pope's." At this stage of his development, Piers, it would seem, was little more than the John Bull, the typical honest man of our own day. "But towards the conclusion of the B text (or later version) the poet strikes a higher note, and makes him the type of human nature in its highest form of excellence—the human flesh within whom dwelt the divine soul of Christ our Saviour. By a sort of parody on the text in 1 Cor. x. 4, he asserts that *Petrus est Christus*, that Piers is Christ, and he likens the Saviour to a champion who fights in Piers' armour—that is to say, in human flesh, *humana natura*."<sup>1</sup> Piers, in short, was Manu, the ideal man, and, in virtue of the divine nature present in his manhood, the Christ of the generation in which he appeared.

There is scarcely a variety of scepticism, or of speculative infidelity, known to the modern world which has not its prototype amongst the conflicting systems which the subtle intellect of Hindostan ultimately developed. There, as here, thought has dashed itself in its pride against the insoluble problems of God's government, and sunk in despair.<sup>2</sup> But there too, as here, controversy has at any rate taught the lesson that, whilst error is multiform and evanescent, truth, even when

<sup>1</sup> Skeat's *Piers Ploughman*, Introd., p. xxiv.

<sup>2</sup> Of this assertion, those who do not wish to go any further, will find abundant proof in the *Metrical Translations* already so often referred to—*c.g.*, in *Jabali's Sophistical Discourse* and *Rama's Reply*, p. 14.

incomplete, is one and abiding; and the only systems which have never quitted the field have been those which sought the image of a perfect God, and the traces of an absolute law, in the primary characteristics and normal impulses of man. In our own age, when pessimistic leanings are so prevalent, it is well to remember that the optimism of Manu with reference to the present life,<sup>1</sup> all along preponderated. Even the popular religion continued to bear traces of what may be called the orthodoxy of the speculative systems. When, during the epic period, Brahma gradually disappears, and Vishnu and Siva come into the foreground, the first place is assigned to Vishnu, the good principle; and in the conception of the Trimurti, the Hindu Trinity, both Brahma and Vishnu take precedence of Siva.

3d, *The Western Asiatic Branch*.—The other typical religion of the Aryan nations in Asia was that of the Iranian or Persian branch, and it too, as we have already seen,<sup>2</sup> was not only monotheistic but optimist,—the character of the creature corresponding to that of the Creator. This statement is one about which oriental scholars are now so entirely agreed, and which is so generally accepted,<sup>3</sup> that I need scarcely occupy your time in substantiating it by further references. The most marked characteristic of the creed of Persia is, that here, for the first time, we find these fundamentally human dogmas separated from mere nature-worship, and exhibiting themselves as individual

<sup>1</sup> P. 34.

<sup>2</sup> *Ante*, p. 61.

<sup>3</sup> Neander, *Ch. His.*, vol. ii. p. 6. Hegel's *Philos. of History*, p. 186, Bohn's translations.

ethical beliefs. Baron Bunsen has said of Zoroaster that he is the Aryan Abraham and Moses in one; and if the Veda be older than the Zendavesta, it is equally certain that Zoroaster preceded any other known prophet of heathendom by a vast space of time. Before the time of Buddha we scarcely hear of any hero-teacher in India of outstanding magnitude, with the partial exception, perhaps, of the author or authors of the *Laws of Manu*; and between Zoroaster and Buddha there are about 2500 years. The faith of Zoroaster is revealed to us in a hymn which Bunsen<sup>1</sup> gives in translation, and on which Count Gobineau<sup>2</sup> has commented. From this document, the authenticity of which does not seem to be contested, we learn that Zoroaster believed in one primordial divinity, "one all-wise and living God," with whom the spirit, "the firstling of creation dwells," whom he called Ahura-Mazda, and whom Gobineau, and Muir though less confidently,<sup>3</sup> identify with the Varouna of the Veda and the Ouranos of the Greeks. But in my view of the matter, as I have already said, absolute dualism—*i.e.*, two self-created and independent existences—is an impossible creed.<sup>4</sup> The only point to which I attach importance is the character ascribed to the divinity to whom precedence is granted. On this point the name itself is instructive, for in the old language of Bactra, we are told Ahura means the spirit, and Mazda the wise, the wisdom-giving;<sup>5</sup> and the hymn in question is as explicit as is conceivable in such a composition. "The pious hearts dost thou give to inherit the earth, and dost punish those who are

<sup>1</sup> Vol. i. p. 206.<sup>2</sup> Vol. i. p. 40.<sup>3</sup> *Terts*, vol. v. p. 72.<sup>4</sup> *Ante*, p. 84 *et seq.*<sup>5</sup> Bunsen, *ut sup.*, 259.



void of truth and false to their promise.”<sup>1</sup> It is in the same strain that the disciples of Zoroaster sing in the Gâthâs—“I would fain inquire of thee, O thou living God; open unto me the truth! How arose the best present life” (their world)? “By what means are the present things to be supported? Thou Spirit, All-Holy, O Mazda, art the sanctuary of all truth!” And the hymn concludes thus: “What I would ask thee, tell me right, O thou living God! Who made the gentle light and warmth? Who made waking and sleeping? Who hath made day and night to remind the wise man continually of his duties?” A man who could take such a view as this of God and His kingdom on earth, was not very far from the kingdom of heaven.

*4th, Non-Aryan and Mixed Races of Asia.*—What has been called the Devil-worship of the hill-tribes, or non-Aryan and inferior races of India, the “black skins,”<sup>2</sup> like the characteristics of savages generally,<sup>3</sup> in no degree invalidates the proof of the fundamental beliefs of humanity derived from the sentiments of the higher races. It does not prove the absence of such a sentiment even in these races. There is no stronger proof of the consciousness that right is right, than the consciousness that wrong is wrong; and the deprecatory rites of the poor Khond or Santal indicate a mistaken theology rather than a mistaken anthropology. His recognition of himself as a sinner is no error at all; and his conception of God only as an avenger of sin, though a deplorable error, is not quite so conclusive a proof even against his theology as is sometimes imagined. No opponent of Christianity ever maintained that

<sup>1</sup> Bunsen, *ut sup.*, 280.

<sup>2</sup> *Ante*, p. 73.

<sup>3</sup> *Ante*, p. 51.

it was a worship of the Devil; and yet there have been Christian doctrines, if not Christian practices, which were simply diabolical.<sup>1</sup> On such doctrines it is true that no rational system either of theology or jurisprudence can be directly built; but, indirectly, they indicate the presence of the very sentiments which they professedly exclude, and it is in this respect that their superiority to mere want of thought and feeling becomes apparent. On the ground that it is as a being who prays and worships that man is distinguishable from the brutes, something may perhaps be said even for the religious observances of the ancient Mexicans, and for the "grand custom" of Dahomey. Whether beings that pray and worship after such fashions be human beings, in the *full* sense of the word, is a question which I shall leave those who contend for the equality of races to answer. It is probable that our knowledge of their real sentiments is very imperfect, and all that I shall say is, that though I do not recognize them as breaking that chain of unity, and consequently of uniform belief, which binds humanity together, I do not accept them as other than very imperfect interpreters and illustrators of the fundamental beliefs and normal impulses of humanity.

*5th, Buddhism.*—A much more serious difficulty than is presented by Fetichism, or the lower forms of idolatry, whether in India or elsewhere, arises out of the characteristics usually ascribed to Buddhism. Buddhism is said to be the prevailing religion of the world. Its adherents are estimated at from 300,000,000 to 400,000,000, and it is

<sup>1</sup> See Lecky, *Hist. of Europ. Morals*, *passim*.

not likely that they fall much, if at all, below a third of the human race.<sup>1</sup> It had its rise, too, amongst the Aryans of India; and though its adherents at the present day for the most part belong to other races, they are races which exhibit moral and intellectual qualities entitling them to rank immediately after, if not on a par with, men of Indo-Germanic blood.

Now, though we may get over the difficulty of their so-called atheism on the ground already stated,<sup>2</sup> it does at first seem very bewildering that such a population as this should believe that existence is an evil, that human life on the whole is miserable, a curse and not a blessing, and that this misery is not a mere taint in it, the removal of which would make it happy, but its very essence. "How," we exclaim, "can the law of such a nature as this guide us either to perfection or wellbeing?" and we seem driven, with Guatama, to sigh for escape from it, and to accept Nirvâna in this, its common acceptation, as the highest object of desire. But "there is," as Bunsen<sup>3</sup> has said, "no more utter denial of a divine order of the world, or of the science of its laws, than the assumption that existence is nothing but a curse, and that the aim of human effort is its own annihilation, and that of its motive-spring." If such a creed were really held by a third of the human race, and if from the other two-thirds we deduct those who have no appreciable creed at all,

<sup>1</sup> Schlagintweit (pp. 12-15) makes their numbers exceed those of Christians by 5,000,000; whilst Max Müller (*Chips*, vol. i. p. 215) gives the numerical superiority to Christians. Bunsen's estimate is 300,000,000.

<sup>2</sup> *Ante*, pp. 47, 65, 85 *et seq.*

<sup>3</sup> *Ut sup.*, vol. i. p. 245.

it would really become a very doubtful point whether man be an autonomous being.

At first we feel disposed to reject the statement as utterly erroneous, on the ground of its inconsistency, not only with our own subjective experience, but also with the character which is ascribed, even by those by whom it is made, to the great religious and moral reformer whose name it bears. By what, if we may use the word without irreverence, can be best described as a "fluke," Buddha has been canonized, and by the name of St Josaphat, is now a saint both of the Eastern and of the Western Church.<sup>1</sup> But it is with his moral character, which even canonization does not always guarantee, that we are chiefly concerned; and that in his life and doctrine, as regarded secular duty at all events, Buddha approached more nearly to the Divine Author of our own religion than any other historical character, is a matter of general agreement. There is scarcely a Christian virtue which he did not preach and practise. But if the whole object of his life had been its extinction, it must surely have been difficult, as Bunsen has said,<sup>2</sup> "to escape the conclusion that suicide, or absolute recklessness, would lead more surely to that end than an arduous and painful process of sanctification to be reached by a life of incessant self-denial and privation."

The highest authority for this account of Nirvâna is Eugène Burnouf, whose early death was an irreparable loss to science; but it is and has long been the common opinion.<sup>3</sup>

<sup>1</sup> *Chips*, vol. iv. p. 188.

<sup>2</sup> P. 367.

<sup>3</sup> Barthélemy St Hilaire, *ut sup.*, Dr Goldstücker (?) in *Chambers's Encyc.*, &c.

Max Müller adopts a middle course. He holds Nirvâna to have meant annihilation, "blowing out," and not absorption; but he declines to express any positive opinion whether such was the view of Buddha himself, or only of his disciples.<sup>1</sup> Bunsen adopts the opposite view, and, as concerns Buddha himself, or any expressions of opinion which, with probability, can be traced to him, I think he has shown (chiefly from the *Dhammapada*<sup>2</sup>—*Footprints of the Law*, or, *Path of Virtue*, the oldest of the Pali books, published since Burnouf's death) that his conception of Nirwana, or Nirvâna, was indeed annihilation, and annihilation of *self*,—but of self not in the sense of *being*, but of *passion*. It was the conquest, in short, of the lower and exceptional by the higher and normal, nature of man,—absorption, not of separate existence, but of separate will,—precisely what all saints and sages have aimed at, and generally by means very similar to those which Buddha recommended.

"He who should conquer in battle ten times a hundred thousand," says the *Dhammapada*, "were indeed a hero; but truly a greater hero is he who has but once conquered himself." Who is not reminded of Solomon's proverb: "He that is slow to anger is better than the mighty; and he that ruleth his spirit than he that taketh a city" ?<sup>3</sup>

"He who lives in lust for a hundred years, ever unquiet in his heart; much better a single day of a temperate, thoughtful life."

"The best prayer is patience, ever gentle;"

<sup>1</sup> *Chips*, vol. i. p. 284.

<sup>2</sup> A complete translation of the *Dhammapada* was published by Max Müller in 1870, as an introduction to Captain Rogers's *Translation of the Parables of Buddhaghosha*.

<sup>3</sup> Chap. xvi. 32.



“To Buddhas, Nirvâna is the name of that which is alone good.”

Immortality is frequently mentioned—a fact which in itself seems a conclusive answer to the charge of absolute annihilation.

“He who lives a hundred years, and does not behold the path to *immortality* ;”

“Much better a single day of him who desires that path.”

“He who strives not to obtain aught for himself, who never doubts after he has perceived the truth, he who has come to know *immortality*, him alone do I call a Brahmana.”

“He who is free from disquietude, whose heart and *longing are on the other shore of the two worlds*,” &c.

“The evil-doer mourns in this world, and he mourns in the *next* ; he mourns in *both*.”

But the most curious passage I have found is this : “Some people are born again ; evil-doers go to hell ; righteous people go to heaven ; those who are free from worldly desires enter Nirvâna.”<sup>1</sup> Heaven is often spoken of, but the relation in which it stands to Nirvâna is not very obvious, and the preference given to holiness in the following passage is very remarkable : “Better than sovereignty over the earth, better than going to heaven, better than lordship over all worlds, is the reward of the first step in holiness.” Nor is any undue value attached to ascetic observances. “Not nakedness, not platted (matted ?) hair, not dirt, not fasting or lying on the earth, not rubbing with dust, not sitting motionless, can purify a mortal who has not overcome desires.”

<sup>1</sup> *Buddhaghosha, ut sup.*, p. xciv.

Patience and resignation are the burthen of the song.

"He who when assailed does not resist, but speaks mildly to his tormentors" (turns to them the other cheek ?);

"He who grudges nothing to him who grudges him all, him alone I call a Brahmana."

"He who puts from him desire and hatred, pride and hypocrisy,"

"As a grain that flies from the point of an arrow; him do I call a Brahmana."

"Hatred does not cease by hatred at any time: hatred ceases by love; this is an old rule."

If to passages like these we add the account which Buddha gave of his own state three months before his death,<sup>1</sup> we shall have little hesitation as to his conception of the object of life.

"I have attained the highest wisdom; I am without wishes; I desire nothing. I am stripped of selfishness, personal feeling, pride, obstinacy, enmity. Till now I have borne hatred, been passionate, erring, in bondage, a slave to the conditions of birth, of age, of sickness, of sorrow, of pain, of suffering, of care, of misfortune. May many thousands forsake their homes, live as saints, and after they have devoted their lives to meditation and renounced all pleasure, be born again to a portion in the worlds of Brahma, and fill those worlds in countless hosts!"<sup>2</sup>

This, then, was what was meant by becoming a Buddha,—this was Nirvâna as Buddha himself conceived it. But the question for us here is not what an exceptional person like Buddha thought or taught, but what his 300,000,000 fol-

<sup>1</sup> Bunsen, *ut sup.*, vol. i. p. 360.

<sup>2</sup> P. 360.

lowers found it possible to believe. Did they accept Nirvâna as it was explained by Buddha, or as it has been explained by M. Burnouf, M. Barthélemy St Hilaire, and others? Now the true answer to this, as to many questions with reference to popular conceptions of doctrine, whether religious or political, seems to be, that the original view was not lost, but that it was confused, exaggerated, and corrupted. The ordinary man does not differ from the extraordinary man in kind, but only in degree. The facts of nature on the conscious recognition of which the creed of the latter rests, and as a necessary consequence the truths which that creed embodies, are imperfectly apprehended by the former; and then the errors to which these partial apprehensions give rise are worked out into their logical results by the one-sided tendencies of the inferior mind. The truth which Buddha had taught, that bliss and virtue being coincident, the former is attainable only by the self-mortification—the death of the lower and exceptional self—demanded by the latter, was too wide a conception for the pedants who professed to be his interpreters; and yet there were natural instincts which forbade its absolute rejection. It was accepted, accordingly, in the Abidhedharma, or metaphysical portion of the canon, not in its integrity, as a rational belief, but partially, as an incomprehensible dogma, which, when applied to practice, generated two kinds of error. 1st, The exceptional and contradictory elements of individual nature, in virtue of which it becomes self-destructive, being mistaken for, or confounded with, the fundamental nature of humanity itself, the condemnation which Buddha had pronounced on the former was applied to the latter; and the

followers of Buddha<sup>1</sup> became ascetics, just as those of Socrates and of Christ did after them. 2*d*, Self-abnegation, which Buddha intended as a means, was accepted as an end; and men mortified themselves not in order that they might live, but lived in order that they might mortify themselves. Death thus became the object of life. Viewed in this light, Nirvâna—self-annihilation—in place of being an exceptional and unintelligible phenomenon, becomes merely an illustration of what I shall have frequent occasion to dwell upon hereafter as the commonest of all human errors—viz., a wholly false conclusion logically deduced from premises which are only a partial misunderstanding of the truth.

It is quite true, as Max Müller has said,<sup>2</sup> that such could never have been the creed of millions of men—that however it might have been promulgated by pedantic logicians, the great human heart must always have rejected it. In the deeper sense of faith, or in the conscious sense of reason, I believe it to have been as impossible a creed for one man as for 300,000,000. Nobody ever really believed it. On the other hand, we must remember with what prodigious tenacity the masses can cling to the errors of their teachers, even when these errors conflict with the feelings of nature. For many ages, in Christian Europe, whilst men daily thanked God for His gifts, scarcely any

<sup>1</sup> That an ascetic character was ascribed to Buddha himself is plain from the custom affixing the word *Muni*, solitary (Greek *μονος*, alone), to his family name, Sakya, and prefixing Sramana, ascetic, to Guatama—the epithet of the “Solar” race from which the family was sprung. *Chambers's Encyclop.*, v. Buddha.

<sup>2</sup> *Chips*, p. 285. The subject is more fully discussed in the Introduction to *Buddhaghosha*, p. xl *et seq.*

one doubted the merit of rejecting them; and there is reason to believe that more than the half of Christendom, at this moment, holds, with equal tenacity, two views of the Divine nature which directly contradict each other. God is believed to be perfectly good and absolutely powerful; and yet He is represented not only as incapable of vanquishing sin in others, but as Himself committing what He has taught human beings to regard as sin. The explanation of the phenomenon consists in the rash acceptance of irreconcilable premises, from which there is no longer any means of escape.

It has been the same with our politics as with our religion. Buddha, as we shall see, taught that all men are equal before the law—relatively equal, that is, not absolutely. In this respect his teaching was in accordance with that of nature, as interpreted by the daily experience and fundamental consciousness of humanity in all ages; and over a large portion of the East it seems to have been accepted. But, in Europe and America, for now more than a century, theoretical shallowness and dishonesty, coupled with popular passion and stupidity, have constantly transformed the dogma into an assertion of absolute equality; and in this shape it has yielded logical results the very reverse of those which would have followed from the original maxim—viz., anarchy and despotism, in place of liberty and order. Now no honest man, in his sober senses, knowingly accepts anarchy or despotism as the object of his life as a citizen; and yet there is too much reason to believe that a creed which logically offers no other alternative is, in our own day, the professed creed of a large proportion of civilized mankind!



Without, then, abandoning our belief in the fundamental agreement of humanity with reference to the object of its existence, we may assume, in accordance with what appears to be the best evidence, that, to the followers of Buddha generally, though not to himself, Nirwâna or Nirvâna meant, and means, not perhaps absolute annihilation, but at all events escape from, and the impossibility of return to, existence in the sense of activity. Thus understood, it differs very widely from the ideal result—the *summum bonum*—of European life either here or hereafter. It is the very opposite of the old Greek conception of what man was to strive after in the present life; and putting it at the highest, it embraces only the negative side of the Christian conception of the life to come; though, if we reflect how difficult it is, when oriental imagery is laid aside, to ascribe to Heaven, when represented as a life from which hope is shut out by fruition, any positive element beyond the ecstasy of divine contemplation—which Nirwâna probably did not exclude—we may hesitate in pronouncing the antithesis here to be quite so absolute. Nor is the longing for the negation of passion so exceptional a sentiment on the Buddhist's part. Have we not the nepenthes (*νηπενθής*) of Homeric legend,<sup>1</sup> and the apathy (*ἀπάθεια*) of the Stoics, to say nothing of the various sects of Christian quietists? We must bear in mind, moreover, that the conception which man, either as an individual or a race, forms of the objects of life, or the consequences of death, is very much an affair of temperament, and of climate, which is one great determiner of temperament. So far Montesquieu was right; and there

<sup>1</sup> Bunsen, vol. i. p. 340.

was truth in Pascal's saying, that good and evil, truth and falsehood, differ with a few degrees of latitude. Just as it is in the highest races, so it is in the most genial climates alone that we must look for normal human thoughts and feelings. The enervating and joyless monotony of a tropical sky takes away the power of endurance and the love of life; just as the gloomy and blustering north inures to suffering and hardens the character. When men of Teutonic or Celtic blood come to a region where the grape ripens, the Protestant hell of the north finds, for the fortunate majority of mankind, a partial substitute in the milder purgatory of the Roman Catholic. Even in heathen times, it was only in very exceptional social circumstances that Europeans ever were disposed, in any numbers, to lay claim, prematurely, to "nature's privilege to die." In a precisely similar manner, it would seem that when the man of the south comes under the influence of the blessed alternations of summer and winter, seed-time and harvest, presently his longing for the cessation of positive existence disappears. Schlagintweit tells us<sup>1</sup> that, in Tibet, Nirwâna has become a mythical doctrine peculiar to the priesthood, and that "in general the Tibetans of the present day do not properly distinguish between Nirwâna and Sukhavati," the latter being a heaven of positive happiness.<sup>2</sup>

But whether or not Buddhist conceptions of the consummation to be attained, either in time or in eternity, differ from our own to the extent that so many seem anxious to believe,

<sup>1</sup> P. 99.

<sup>2</sup> Mr Alabaster's account of the Siamese is to the same effect.—*The Wheel of the Law*, xxxviii.

what is undeniable, and far more important for our purpose, is, that both the law—"the path," as they happily characterize it—by which the object of life may be reached, and the method by which this path is to be discovered, remain the same. It was part and parcel of the creed of this vast section of mankind, that Buddha—who was not a god, but the ideal man—in realizing what was the legitimate object of existence, as he conceived it, had been guided by a law which his own nature revealed to him, and which the nature of his followers would reveal to them. The Buddhist lays claim to no external revelation whatever. His system is essentially subjective ;<sup>1</sup> the law in which he believes is "within him;" and his belief, moreover, is that he can find it himself—for every Buddhist is his own priest. But what, then, is the character of this law which the nature of the Buddhist reveals to him for a purpose which is said to be so strange to us? To our relief and astonishment we find that it is the very same law which our nature reveals to us. The Buddhist is to seek annihilation, as we seek life eternal,—by abstaining from murder, theft, adultery, lying, and drunkenness; by obeying his parents, revering the aged, confessing his sins, and saying his prayers (to whom ?),<sup>2</sup> and being charitable to all men. Characteristically enough, the duties of abstinence, or, as they are called, "the precepts of aversion," take precedence of the precepts of action, to which Christianity gives so prominent a place.<sup>3</sup>

<sup>1</sup> Max Müller, *Sanscrit Lit.*, p. 32. Alabaster, *ut sup.*, xviii.

<sup>2</sup> The existence of the "praying wheel," so much dwelt upon by those whose effort is to depreciate the religion of the Buddhist, is alone sufficient to refute their allegations with reference to the Buddhist creed.

<sup>3</sup> *Ecce Homo*, p. 175.

But the precepts, in so far as nature can reveal them, are identical, and *if* the Buddhist has no theology, it is plain that ethics and jurisprudence are not shut out from him by his creed. In this world, at all events, he believes in God. The ground, too, on which Buddhism arose, as a protest against Brahmanism, is instructive, as illustrating the solidarity of heathen and Christian ethics. I refer to the substantial identity between a movement which was independent of Christianity, and which we must therefore ascribe to what we are in the habit, very erroneously probably, of designating "unassisted nature," and the tendencies of modern European life which we trace to Christian influences. Buddhism was a protest against the exclusiveness of caste—a proclamation of *les carrières ouvertes*, of equality before the law, of universal charity, and, in a word, of the positive jurisprudence of the nineteenth century. In this respect M. Barthélemy St Hilaire's recognition of its merits are so ample, as to form a strange contrast with what I cannot but regard as his prejudice against it as a theological doctrine. The phenomenon of a religious system drifting away from the ethics of nature, and inculcating doctrines which the human heart rejects, is not unknown, indeed, even to Christian times. But it is difficult to imagine that an ethical system which preaches universal charity, which seeks "to cure not the society of India but the human race,"<sup>1</sup> can have come out of, or co-existed with, a religious system which inculcates pure selfishness.<sup>2</sup> Either the one or the other was pretty sure to have given way; and that the ethical system was not only at the

<sup>1</sup> Max Müller, *Sanscrit Lit.*, p. 145.

<sup>2</sup> *Ib.*, p. 150.

root of the religious system in the first instance, but that it continued to hold its own, seems to be matter of general admission.

It may be questioned whether the enthusiasm of Buddha's French expositors for his ethics and politics, as contrasted with his theology, would have been quite so ardent if they had reflected on the fact that his conception of "fraternity" by no means involved the one-sided notion of the human relations to which they cling with so much tenacity. In preaching brotherhood, Buddha did not forget that it is to Fatherhood that precedence is due, and consequently "there is no trace of social levelling, or democratic communism, in any of his sermons."<sup>1</sup> On the contrary, we find in the Dhammapada—

"He who cherishes reverence in his heart, and ever honours his superiors,"

"To him shall be ever added these four gifts: Long life, beauty, joy, power."<sup>2</sup>

<sup>1</sup> *Chips*, vol. i. p. 343. Alabaster, xxxvi.

<sup>2</sup> Bunsen, *ut sup.*, vol. i. 347. There is one distinction between European exclusiveness, even in its sharpest and hardest form, and the system of castes in India, which an Indian friend pointed out to me, and which it is important to bear in mind. In Europe the upward passage from class to class alone is blocked, whereas in the East the passage is blocked both ways. In old France, *e.g.*, the *noblesse* was shut against the *bourgeoisie*, but not the *bourgeoisie* against the *noblesse*. The valves, so to speak, opened downwards; and in the modified form in which exclusiveness has existed in this country, it has always acted in the same manner. A millionaire who was deficient in culture or refinement might have some difficulty in finding his way into the aristocracy, but an aristocrat who had lost his fortune, or made a marriage below his class, if there was no other objection to him, would be well enough received by the class to which he had chosen to ally himself. But in the East, if a man quits the caste to which he belongs, he quits all caste—he falls out of caste—*i.e.*, out of the sphere of Hindu society altogether. He becomes an outcast—a pariah; and it is this circumstance more than any other that has opposed the spread of Christianity. The ideal of



(c) *The Turanian Races*.—In so far as the anthropological beliefs of the partially civilized Turanian races have been investigated, apart from their religious dogmas, they do not differ substantially from those of the Aryan race. On the principle of selecting the best witnesses, the whole of the vast Turanian family might perhaps be passed over in silence, in so slight a sketch as we are here attempting. The characteristic of the religions of the Mongolian tribes of Asia—to which the Turks belong—like that of the lower, less developed, and retrograde races generally, is enthusiasm.<sup>1</sup> Their light being supposed to proceed entirely from external sources, the link which connects them with the divine is not reason, but sentiment, which rises into ecstasy in proportion to the extent to which reason is silenced by sleep, by disease, by exhaustion, intoxication, and the like. This tendency diminishes, of course, as the race rises in importance, till we reach its highest manifestation in the Magyars, who exhibit a sanity of character to which the Celtic branch of the Aryan race can scarcely lay claim, and whose ancient liberties sufficiently attest their sense of human autonomy. But it is to their connection, though not, as it seems, their identity, with the Chinese, that these races owe their chief interest.

social organization is open classification—a classification in which the individual shall be free either to rise or to fall—and to this we certainly come nearer in this country than anywhere else. Even in the case of our hereditary nobility, it is in the case of the eldest son only that we endeavour to prevent a change of class; and now that intermarriage between the Royal family and subjects has been sanctioned, there is nothing to prevent a grandson of the Queen from sinking to any position to which his worthlessness or incapacity may degrade him, except, indeed, the contingency of his succeeding to the crown, or to any intermediate honour which might chance to open to him.

<sup>1</sup> *Ib.*, vol. i. p. 237.

*The Chinese.*—The earliest form of anthropological belief exhibited by the Chinese, and that to which they have constantly adhered during the whole course of their long national life, embraces a direct recognition of human autonomy. Whether or not Baron Bunsen be correct in asserting that “the actual aboriginal tribe of the primeval home of man has settled itself in the extreme east of Asia, and maintained itself there up to the present day,” and that the language of China “forms an irrefragable testimony to the autochthonic character of the unique position which it occupies,” there can, I imagine, be no doubt of the strictly national character of two out of the three religions which exist, side by side, in that strange country, or of the great antiquity of that which forms, at the present day, the basis of the civil life of the State. Confucius was born in 551 B.C., and died in 479 B.C.<sup>1</sup> But “Confucius is not the religious prophet of Ancient China. The SACRED BOOKS (King) are his work in so far as he saved them from perishing by making this collection, but they are not his composition. They are now fragments remaining from a very ancient epoch, and they were so, no doubt, at that time.”<sup>2</sup> This being so, these documents may probably be held to contain the earliest statement which we possess of an anthropological creed; and in this point of view, considering the very wonderful qualities of the race who held it, we owe a debt of gratitude to those who have brought it under our notice. Following Bunsen,<sup>3</sup> then, as our most convenient, and, from the vast extent of his

<sup>1</sup> Bunsen, p. 259.

<sup>2</sup> *Ib.*, p. 244.

<sup>3</sup> From such further acquaintance with the subject as I have been able to make through Professor Legge's translation of the *Chinese Classics*, I am convinced that the view here presented of Chinese opinion, though slight, is not inaccurate.

general as well as special learning, probably most trustworthy guide, "let us listen to one or two of the utterances of these Sacred Books, which bear most closely on the point which concerns us. This is from the Shi-King. 'The opinion and judgment of Heaven is learned (reveals itself) through the opinion and judgment of our people. Heaven's approval and disapproval (is recognized) through the approval and disapproval of our people. An intimate relation subsists between the upper and lower world. Oh, how careful should those be who govern countries!'"<sup>1</sup>

Apropos of this remarkable specimen of antediluvian politics, Bunsen relates an interesting anecdote of our own day. Gutzlaff told him, he says, that "when after the peace of Nankin, in 1845, the Emperor of China felt himself impelled to refuse his assent to the execution of that article of the treaty by which the Tartar city of Canton was to be opened to foreigners, he justified his repudiation by this great maxim of the Sacred Books. And 'the voice of the people is the voice of God,' resounded once more through the whole empire. When the Emperor's edict was published, and everywhere formed the subject of discussion, it was said to Gutzlaff by patriotic Chinese: 'That maxim of our Sacred Books is well known to us—it is our watchword; but this was a new thing to us, that the Mandshu Emperor should publicly appeal to this sacred text of the Scriptures, which testifies against himself.'"<sup>2</sup> By what qualifications our primeval ancestors—if such they were—guarded this profound but perilous maxim against the false interpretations which it has received, and still receives, amongst

<sup>1</sup> Bunsen, p. 252.

<sup>2</sup> *Ib.*, pp. 252, 253.

ourselves, we are not informed. But it surely is a striking instance of the *consensus* of mankind in their anthropological conceptions, that a maxim which embodies so much of the truth and nearly all the falsehood of modern politics, should have been familiar to the ears of what there is reason to believe was the oldest civilized community. There is, indeed, no lore which brings home to us so forcibly the unity of mankind as that of maxims, proverbs, gnomes, and the like. We find the *γνώθι σεαυτὸν*, like the golden rule, everywhere; and here is another remarkable instance of the fact that Socrates, like the rest of us, had his precursors. Lao-tse was more than half a century<sup>1</sup> older than Confucius, and 136 years older than Socrates, and we are told that he was in the habit of saying that the wise man is he who "knows that he knows nothing!"<sup>2</sup> Yet the Chinese were, and are, far from a speculative people; so far from it, indeed, that those who have made a study of their language tell us that "to express mind, thought itself—that which predicates—it has absolutely no term whatever;"<sup>3</sup> and Bunsen tells us, as the result of his studies, that but for this very faith in the innateness of the personal element—of absolute reason—in man, its realism "would have sunk down into the slime of materialism."<sup>4</sup>

In a subsequent passage he thus sums up their wisdom—

"If we sum up the whole, we find one thought continually recurring in the works of all those sages, as the root-idea of the ancient system, and we may express it thus: There is a law which governs the All, in nature and in man, and this One Law is reasonable. Thus, indeed, it had been said by Meng-Zo, the

<sup>1</sup> Bunsen, p. 259.

<sup>2</sup> P. 265.

<sup>3</sup> P. 256.

<sup>4</sup> P. 255.

renowned successor of Confucius, in the fourth century before our era, ‘He who knows *his own nature*, and that of all things, knows what Heaven is; for Heaven is, indeed, the inward essence and the vital energy of all things.’ This thought is the dowry of the Chinese intellect in the general history of man; the conception of a Kosmos *in*, if not *above*, the various objects, which, however, attains personality only in the human mind. Man’s life is to be orderly, like that of nature; the sphere of this life in which the Chinese recognize something divine, is that of the family; the bond between parents and children is to him the most sacred of all bonds.”<sup>1</sup> In these two conceptions—of the dignity of the person on the one hand, and the sacredness of paternal authority and filial obedience on the other—we have the secret of that marvellous length of days which, notwithstanding all their faults, has been granted to this strange people. Had the political philosophy of our own day kept a place for the second of these conceptions, and remembered “the first commandment with promise,” our progressive realization of the other would have been effected without those outbursts of anarchic fury which make the streets of Paris periodically run with blood.

Lest it should be supposed that the view which I have here presented rests on a single authority, it may be proper that I should mention that to whatever extent Baron Bunsen’s view of the autochthonous character of the Chinese may be peculiar, his opinion on the point with which we are concerned is the common opinion. All are agreed that the teaching of Confucius, “the Master,” is the most faithful expression of the

<sup>1</sup> Bunsen, pp. 268, 269.



national mind, and that that teaching was based on the revelations of our common nature. "I teach you nothing," he says, "but what you might learn yourselves—viz., the observance of the three fundamental laws of relation between sovereign and subject, father and child, husband and wife; and the five capital virtues,—universal charity, impartial justice, conformity to ceremonies and established usages, rectitude of heart and mind, and pure sincerity."<sup>1</sup>

To the same effect we have the testimony of Dr Legge.<sup>2</sup> "He truly said of himself that he was a transmitter and not a maker. He held that the rule of life for men in all their relations was to be found within themselves, and that the right development of the rule was to be found in the words and institutions of the ancient sages."<sup>3</sup>

That Confucius failed to infer any species of natural theology from so sound an ethical system is the statement usually made, and for a criticism of which I refer you to Bunsen's and Legge's pages. To the extent to which it is true it shows, of course, the absence of speculative genius. But it does not invalidate the assertion that, in proclaiming humanity to be autonomous, his anthropological creed agreed with that of the rest of mankind in affording a sufficient basis for a system of natural jurisprudence. In farther proof of this assertion I shall venture on one additional quotation too

<sup>1</sup> *Chambers's Encyc.*, v. Confucius.

<sup>2</sup> Lecture in Philosophical Institution of Edinburgh, Dec. 14, 1869. Dr Legge, formerly of Hong-Kong, is now the Professor of Chinese in the University of Oxford; and his work on the *Chinese Classics*, already referred to, is the leading authority on the subject.

<sup>3</sup> *Chinese Classics*, vol. i. p. 59.

remarkable to be omitted. It is from "the Doctrine of the Mean."<sup>1</sup>

"1. What heaven has conferred is called THE NATURE; an accordance with this nature is called THE PATH *of duty*; the regulation of this path is called INSTRUCTION."

"2. The path may not be left for an instant. If it could be left it would not be the path. On this account the superior man does not wait till he sees things to be cautious, nor till he hears things to be apprehensive."

"3. There is nothing more visible than what is secret, and nothing more manifest than what is minute. Therefore the superior man is watchful over himself when he is alone."

"4. While there are no stirrings of pleasure, anger, sorrow, or joy, the mind may be said to be in the state of EQUILIBRIUM. When those feelings have been stirred, and they act in their due degree, there ensues what may be called the state of HARMONY. This EQUILIBRIUM is the great root *from which grow all the human actings* in the world, and this HARMONY is the universal path which they all should pursue."

"5. Let the states of equilibrium and harmony exist in perfection, and a happy order will prevail throughout heaven and earth, and all things will be nourished and flourish." Further on, the Master said—"THE PATH is not far from man. When men try to pursue a course which is far from the common indications of consciousness, this course cannot be considered THE PATH."<sup>2</sup> But this is what, in one form or other, the Master is saying continually—*e.g.*, in the *Analects*—"Is

<sup>1</sup> *Chinese Classics*, vol. i. p. 246.

<sup>2</sup> P. 257.

virtue a thing remote? I wish to be virtuous, and lo! virtue is at hand."

As our best witnesses, however, we must return to the Aryan race, and follow it into those seats in which it attained the highest stage of development that mankind, apart from Christian influences, so far as we know, had reached.

(B) *Of Classical Anthropology.*—When we pass from the oriental to the occidental branch of the leading family of mankind, we find that faith in God and nature still forms the centre of belief and the mainspring of action.

(a) *Greece.*—The polytheism of Greece, as of India, was a sensuous or anthropomorphic embodiment of intuitive conceptions of the divine origin and character of nature, the conscious recognition of which, as a spiritual belief, has always been a difficulty to the popular mind. This spiritual creed, though no doubt in a very simple and imperfect form, preceded these mythical symbols in point of time,<sup>1</sup> accompanied them as a deeper undertone during the whole period of their existence,

<sup>1</sup> "Long prior to any popular myths," says Kant, "there lay extant in the human mind its primeval substratum of religion, the first rough development of which uncultivated susceptibility did, during the earlier twilight of dawning knowledge, tend merely to superstitions or hero-worships, and occasioned for their behoof just those various mythical revelations; and thus to those textures, woven by the plastic energies of depictive fancy, there always has adhered some unconscious trait, sufficiently indicative of the character of their supersensible origin."—*Theory of Religion*, Semple's translation, p. 142. Plato believed in the unity of the great final Cause: μήτ' αὖ δύο τινὲ θεῶ φρονοῦντε ἐαυτοῖς ἐναντία στρέφειν αὐτόν ("nor let it be said that there are two gods, of contrary sentiments, causing the universe to turn").—*Politicus*, Bekker, vol. iv. p. 507. And probably of far greater antiquity is the Orphic verse—Ζεὺς κεφαλῇ, Ζεὺς μέσσα. Διὸς δ' ἐκ πάντα τέτυκται.—Hermann's *Orphica*, p. 457.

and gradually becoming clearer and more definite as humanity advanced, ultimately superseded them altogether. The *ἐν καὶ πᾶν* of Xenophanes,<sup>1</sup> for example, was an anticipation of the monotheism which Socrates taught more definitely, and of his polemics against the anthropomorphism of the popular religion.<sup>2</sup> After the time of Socrates the myths were abandoned by those whom we must regard as the interpreters and exponents of the deeper consciousness of the nation, and by degrees even the popular mind drifted away from them; till at last, as Mr Leckie has said, "The children and old women ridiculed Cerberus and the Furies, or treated them as mere metaphors for conscience." But when the popular creed gave way, it was only to make place for a reasoned belief in the old Aryan doctrines which it originally symbolized.

<sup>1</sup> Schwegler, p. 16.

<sup>2</sup> Zeller, *Socrates and the Socratic Schools*, p. 144, refers to Xenophon, *Mem.* iv. 3, 13, in proof of his assertion that Socrates distinguished the Creator and Ruler of the Universe from the rest of the gods, and answers Krische's argument against the genuineness of the passage. The fact that such was Socrates' creed fortunately does not rest on any single passage, but on his habitual use, unless *all* his disciples have misrepresented him, of the word *Θεός*. When, for example, he winds up the magnificent passage in the *Apologia*, § 17 in Bekker's edition, on the folly of not preferring death, which, for all that we know of it, may be good just as well as evil, to neglect of duty which we know to be evil, by telling the Athenians that, much as he loved them, he would obey God rather than them (*πείσομαι δὲ μᾶλλον τῷ θεῷ ἢ ὑμῖν*), and that he would teach wisdom and proclaim the superiority of the soul to the body, if he should die many deaths, because it was God's will (*ταῦτα γὰρ κελεύει ὁ θεός*), who can doubt that the God of whom he spoke was his and our Father in Heaven? Aristotle invariably, I think, uses the word in this sense, *Polit.*, vii. c. iv. Of the similarity between his conception of the divinity, and that to which we are accustomed, a very remarkable instance occurs in the *Politics*, vii. c. i., where he speaks of Him as blessed, not in the possession of external goods, but in His own nature, *ὅς ἐυδαίμων μὲν ἔστι καὶ μαχάριος, δι' οὐθέν δὲ τῶν ἑξωτερικῶν ἀγαθῶν ἀλλὰ δι' αὐτὸν αὐτὸς καὶ τῷ ποίῳ τις εἶναι τὴν φύσιν*.

The difficulties which surround the interpretation of Greek mythology are so great as, in themselves, to form a strong argument in favour of the advice of Socrates to his pupils to look for truth elsewhere; and the subject is so vast as to forbid any attempt at independent treatment of it here, even if I possessed a far more accurate acquaintance with it than I can at all pretend to. But on the fundamental point of the original conception of Deity which it exhibits, it is necessary that I should mention the opinion which has been arrived at by the highest authorities; and the highest of all authorities on Greek mythology is Welcker,<sup>1</sup> to whom, as Max Müller has said, the present generation of German scholars, "a race not quite contemptible in itself," looks up, as the Greeks looked up to Nestor. In doing so I am fortunately enabled to offer the further guarantee which is implied in Professor Müller's words.<sup>2</sup> "Nowhere," says Müller, "have we seen the original character of the worship of Zeus as the God ( $\delta$  θεός), or, as he is called in later times, as the Father of the Gods, as the God of Gods, drawn with so sure and powerful a hand as in Welcker's *Mythology*. When we ascend with him to the most distant heights of Greek history, the idea of God as the Supreme Being stands before us as a simple fact. Next to this adoration of One God, the Father of Heaven, the Father of men, we find in Greece a worship of nature (the manifestation of God). The powers of nature originally worshipped as such, were afterwards changed into a family of Gods, of which

<sup>1</sup> *Griechische Götteslehre*, von F. G. Welcker, 1857.

<sup>2</sup> *Chips*, vol. ii. pp. 151, 152.



Zeus became the king and father.<sup>1</sup> This third phase is what is generally called Greek mythology ; but it was preceded in time, or at least rendered possible in thought, by the two prior conceptions—a belief in a Supreme God and a worship of the powers of nature. The Greek religions, says Welcker, if they are analyzed and reduced to their original form, are far more simple than we think. It is so in all great things. And the better we are acquainted with the variety and complications of all that has grown up around them, the more we feel surprised at the smallness of the first seeds, the simplicity of the fundamental ideas. The divine character of Zeus, as distinct from his mythological character, is more carefully brought out by Welcker. He avails himself of all the discoveries of comparative philology in order to show more clearly how the same idea which found expression in the ancient religion of the Brahmans, the Scythians, and the Germans, had been preserved under the same simple, clear, and sublime name by the original settlers of Hellas.”<sup>2</sup>

It is, and probably will continue to be, impossible to connect the creed of the Western with that of the Eastern branch of the Aryan race by the links of external history. But such evidence of a common origin as internal coincidences afford is abundant. Stripped of its drapery, the religion of Greece, like that of India, was simply a worship of creative power, and a deification of its manifestations. Nature—not in the sense of mere existence, but of ordered activity, Kosmos—was God ;

<sup>1</sup> As to the progress from physiolatry to the embodiment of ethical ideas, v. Bunsen's *God in History*, vol. ii. c. 2.

<sup>2</sup> *Chips, ut sup.*

and the sun, the brightest and most beneficent manifestation of nature, the source of heat and light, the fountain of life in man, and beast, and tree, and plant, was the greatest of the gods. "Orpheus," says Eratosthenes, quoting the Bassarides of Æschylus, "did not honour Dionysus, but believed the sun to be the greatest of the gods, whom also he called Apollo; and, rising up in the night, ascended before dawn to the mountain called Pangæum, that he might see the sun first, at which Dionysus, being enraged, sent upon him the Bassaridæ,"<sup>1</sup> &c. In the first part of this beautiful myth, which will remind many of the sublime passage in Wordsworth's "Excursion," beginning—

"Upon the breast of new-created earth Man walked;"<sup>2</sup>

it is extremely probable that we have the tradition of an actual custom; and, if so, its oriental origin can scarcely be doubted.

"The religion of the sun," it has been said, with much truth I believe, "is inevitable;"<sup>3</sup> but it is remarkable that the primitive beliefs of the classical nations are constantly referred by themselves, not to natural inspiration, to which we should have been led to ascribe them, nor yet to external revelation, like those of Shemitic races, but to tradition for which they do not profess to account. "The tradition has come down from very ancient times, being left in a mythical garb to succeeding generations, that the heavens are gods, and that the Divine embraces the whole of nature. And round this idea other mythical statements have been agglomerated, with a view to influencing the vulgar, and for political and

<sup>1</sup> Smith's *Dict.*, v. Orpheus.

<sup>2</sup> Book iv.

<sup>3</sup> *Chips*, vol. i. p. 241.

moral expediency ; as, for instance, they feign that these gods have human shape, and are like certain of the animals ; and other stories of the kind are added on. Now, if any one will separate from all this the first point alone—viz., that they thought the first and deepest grounds of existence to be Gods (*ὅτι θεοὺς ᾤοντο τὰς πρώτας οὐσίας εἶναι*), he may consider it a Divine utterance.”<sup>1</sup> It is this utterance which Bunsen has traced through the epic and lyric poetry of Greece, and which, with Socrates, he believed to have formed the basis of the Mysteries, and even of the popular cultus.

The first step in the direction of philosophy, or of the discovery of a rational basis of belief, is generally supposed to have consisted in the so-called Cosmologies, or physical and material theories of the universe ; and physical is thus supposed to have preceded ethical and political science. Now, except in so far as cosmology was identified with theology, as in the worship of the sun, and confined itself to the recognition of an unknown power, of which the sun was regarded as the manifestation, I cannot subscribe to this statement ; nor can I concur in the view that it was with Socrates and the sophists that thought was first directed to the rationale of human life.<sup>2</sup> In so far as they had for their object the discovery of the laws of space and number, I do not of course deny to the physical investigations of the Greeks the character of science. But their theories as to the organization of external nature were as vague as their conjectures as to its origin ; and of the laws which govern growth and

<sup>1</sup> Aristot., *Metaphys.*, xi. vi. x. Grant's *Aristotle*, vol. i. p. 230.

<sup>2</sup> Grant's *Aristotle*, vol. i. p. 44.

development, decay and decomposition, chemical combination, or the like, they had not the faintest conception. When Thales tells us that the principle of all things is water, or Anaximenes that it is air, we neither learn anything, nor get hold of the means by which anything is to be learned. To the merit of aspirants they are no doubt entitled; but to the character of discoverers of method they have no more claim than to that of discoverers of truth. Pythagoras, says Bunsen,<sup>1</sup> was "the first of all historical men to utter the great word *Kosmos*, in the sense which we attach to it." The Pythagorean principle of harmony, or proportion, was, no doubt, a very remarkable recognition of the universal prevalence of law; but, beyond the region of mathematics, Pythagoras appears to have traced the action of law in the spheres of social and political rather than of physical life. It is on this ground that Bunsen contrasts him with the other students of nature, as "the first to reconduct speculation once more back to what was human and ethical."<sup>2</sup> But it was the same with the other cosmologists, in so far as they are entitled to the character of scientific inquirers at all. They were philosophical statesmen and moralists in a far higher and truer sense than they were physicists. It was on the ground of his ethico-political wisdom<sup>3</sup> that the name of Thales stood at the head of the seven sages. Heraclitus

<sup>1</sup> Vol. ii. p. 92.

<sup>2</sup> Vol. ii. p. 337. Would that we had another Pythagoras! I have often regretted the tendency of our Scottish philosophers to prefer logic and metaphysics to ethics and politics. Had Sir William Hamilton let the "quantification of the predicate" alone, he might have given Mr Mill much to think of in directions which lay far nearer to the real interests of humanity.

<sup>3</sup> Schwegler, p. 9.

taught that evil is to be regarded as an element that co-operates to the harmony of the whole, thus attempting, in the only manner that has yet seemed possible, to remove the element of contradiction in nature which opposes itself to the recognition of natural law ; whilst the *voûs* of Anaxagoras may be regarded as the first indication of the conscious and reasoned character of self-legislation.

But it is when we abandon those ambitious speculators who professed to explain the laws of the universe, and turn to the statesmen and legislators who made it their business to study mankind with a view to the discovery and practical vindication of the laws which govern their natural relations, that we come in contact with what really was science, though not called by that name. The results attained by these latter inquirers were exhibited both in deeds and in words : they were exhibited in deeds, first by the foundation of the free cities of Ionia, in which the mental as well as the political life of Greece originated ; and then by the Doric legislation, which bore the half-mythical names of Minos and Lycurgus, and which, whatever its real date may have been, was long anterior to the cosmologists ; and lastly, in the Constitution of Solon at Athens and that of Servius Tullius at Rome ;—and they were exhibited in words by proverbs and maxims, which, like the institutions with which they were probably contemporaneous, remount to an unknown antiquity. The earliest historical institutions both of the Greeks and Romans were disfigured by the exclusiveness which marred the whole political life of antiquity, which in the East called for the reform of Buddha, and which, in the modern world, has been



the parent of so many revolutions. But in other respects—as, for example, in the recognition of individual inequality as the source of the organic structure of society—they come closer to natural law, and, as such, were more scientific than the Constitutions which find favour in our own day. So far from being entitled to dismiss them as mere curiosities, as we do the cosmologies, we find in them those principles of order and liberty which it will be the duty of the Christian statesmen of the future to realize amongst the many, as their authors did amongst the few.<sup>1</sup>

As regards the maxims, of which these institutions were the external realization, they were expressed, it is true, in so simple a manner as to have exposed them to the reproach of being “yeoman’s morality.”<sup>2</sup> But, in addition to the reflection that simplicity is of the essence of the maxim—that our own maxims are as simple as those of the Greeks, and that Aristotle, when he uses them, which he does continually, is as great a child of nature as Hesiod,—we must bear in mind, with reference to the maxims in question, more especially, that if they were yeoman’s morality, they were yeoman’s science also. They were results and not guesses, like the dicta of the cosmologists, or our own “leaps in the dark;” and they were results, moreover, of the very same process of investigation which, in antiquity, culminated in the philosophy of Plato and the jurisprudence of Justinian, and which we ourselves must return to if we would go

<sup>1</sup> It is in this point of view that the ethics and politics of Aristotle are so much more valuable than his physics.

<sup>2</sup> Grant’s *Aristotle*, vol. i. p. 56.

beyond Plato and Justinian—the process, viz., of studying human nature on the assumption that in revealing itself it reveals an absolute and permanent law.

We shall more readily see the manner in which this process was applied, if we attend to the characteristics of the three eras into which Sir Alexander Grant and others have divided the ethical history of Greece. We must accept them, however, as indicating stages of mental progress rather than chronological epochs; bearing in mind, moreover, that the great prophet-minds which have determined the transition from earlier to later belong invariably to both. First, then, there is the era of popular or unconscious morals; second, the transitional, sceptical, or sophistical era; and, third, the philosophical or conscious era.<sup>1</sup> Now it is obvious that if the first and third of these eras *agree* in their results, the second, which was polemical and destructive, and never aimed at the production of positive results at all, may be discounted, in any other sense than as an effort of development, a throe of parturition, or, at most, a receding wave in the advancing tide. Let us then compare the primitive ethical and political intuitions with the ultimate beliefs of Greece. The first phase in which both theology and anthropology appear in Greece is, no doubt, wholly concrete. Principles are not stated; they are represented in action, and are commended, or condemned, in the persons who exhibit them by the Nemesis whose organ the epic or lyric poet has become. Now, in this primitive form of its manifestation, the national mind of Greece exhibits, not disbelief or doubt, but perfect

<sup>1</sup> *Ib.*, vol. i. p. 46.

confidence, faith in God and man. The religion of the heroic age, as exhibited by Homer, has in recent years been made the subject of elaborate study in Germany; and of the care with which it has been investigated amongst ourselves, the works of Mr Gladstone and Colonel Mure are sufficient monuments. But without entering on what is almost a shoreless sea, the schoolboy-reading of most of us, I believe, will offer sufficient guarantees for the accuracy of what appears to have been almost the unanimous verdict—viz., that it consists, as Sir Alexander Grant has said, “in a celebration of the beauty of the world, and in a deification of the strong, bright, and brilliant qualities of human nature;”<sup>1</sup> and embraces, as Professor Blackie has remarked, a recognition of the fundamental rectitude of “the whole nature of man.”<sup>2</sup> To such allegations as that, “in those early days there seems no trace of a moral nature in the Greeks,”<sup>3</sup> Bunsen’s reply is sufficient, that the whole scope and object of the Epos is ethical—the exhibition of the Divine Nemesis in the destruction of Troy as a punishment for crime.<sup>4</sup> “The wrong committed by Paris must be atoned for; therefore Troy is doomed to its fate, as Hector himself knows and believes.”<sup>5</sup> “The Homeric use of the word Nemesis,” as Bunsen elsewhere remarks,<sup>6</sup> “is alone sufficient to prove its purely moral origin. Neither in the *Iliad* nor in the *Odyssey* is Nemesis a deity, or even a personified moral quality. The word is there, in the sense in which it lived in the spontaneous feelings and speech of the Ionic people. It

<sup>1</sup> Grant’s *Aristotle*, vol. i. p. 51.

<sup>2</sup> Blackie’s *Homer*.

<sup>3</sup> Donaldson’s *History of Christian Literature*, vol. ii., introduction.

<sup>4</sup> *God in History*, vol. i. p. 23, and vol. ii., *passim*.

<sup>5</sup> *Ib.*, vol. ii. p. 101.

<sup>6</sup> *Ib.*, vol. ii. p. 63.

signifies that moral indignation which we feel at the sight of sinful presumption setting itself up against gods and men; the shrinking, or awe, associated with shame; in other words, the verdict of the inward judge, and the recognition that the universal conscience is man's true consciousness of God and the highest earthly tribunal—the veritable oracle of God."

A very considerable step in advance—though in many respects a step downwards—is made when we pass from Homer to Hesiod. The poet tells us that we are already in the iron age. Contemplation, the child of experience, has been begotten, and whatever may have been the relation of the two eras in point of time, about which there was much difference of opinion even in antiquity, in point of thought it is plain that we are in the gnostic period. Now a gnome (*γνώμη* or *ἐποθήκη*) is a statement not only of an intuitive belief—like that in Nemesis—but of an intuitive feeling of the method by which this belief was reached. Of the gnome, as thus defined, there are many examples in Hesiod, which Aristotle was fond of quoting, and with which you are probably familiar. But the most famous instance of the gnome, and that which is most important for our purposes, is the *γνώθι σεαυτὸν*, which was inscribed on the temple of Apollo at Delphi. We found it in India<sup>1</sup> and in China;<sup>2</sup> and as it was of unknown antiquity in Greece, and its authorship was unknown, unless we are to regard it as the utterance of an instinct common to mankind, which I believe to be the true conception of it, it may with considerable probability be viewed, like the language in which it was couched, as an heir-

<sup>1</sup> *Ante*, pp. 98-116.

<sup>2</sup> *Ante*, p. 122.

loom which the earliest settlers brought from their former abodes, and which the oracle as a pious custodian of patriarchal wisdom had preserved. If the proverb, "Count not your chickens before they be hatched," and La Fontaine's fable of Perrette the milkmaid, have been traced to an Eastern home,<sup>1</sup> why should not the same process be possible in the case of a maxim which must have been suggested by the first dawning of consciousness? This view of the historical origin of this and other gnomic sayings derives some confirmation from the fact that they were transmitted chiefly through the rural classes—always the most faithful guardians of tradition, and whose occupations on the slopes of Mount Parnassus resembled those of their remote forefathers in Upper Asia. Hesiod himself, in contrast to Homer, has been called "the poet of the plough;" and the strong resemblance between his verses and those of the Pythia—in one instance their absolute identity—is well known. But be this as it may, the *γνώθι σεαυτὸν*, as I have said, was written on the human heart before it was written on the temple of Apollo; and the value of the maxim, as indicating a radical belief in the self-revealing and self-legislating character of humanity, is equally great whether we regard it, in the form in which we have received it, as having thus retained its possession of the Aryan mind, or as having a second time descended from heaven, and forced itself on the acceptance of the national consciousness of Greece.

But the *γνώθι σεαυτὸν* is by no means the only instance of a gnome which possessed absolute scientific value. The *Μηδὲν*

<sup>1</sup> *Chips*, vol. iv. p. 145.



ἀγαν of Solon, and the Μέτρον ἄριστον of Cleobulus, in their primary aspects, were neither more nor less than exhortations not to outrage "the modesty of nature," by disturbing the harmony of her laws. I need not tell you how fruitful they became in the Μετριότης of Plato and the Μεσότης of Aristotle;<sup>1</sup> nor insist on the manner in which they link the two periods together. I shall mention only one other instance of the gnome. It is the saying of Simonides that justice consists in "paying one's debts." "It is easy," says Sir Alexander Grant, "to show this definition inadequate, and yet it was a beginning." To me it seems that it was one of those beginnings which include the end; for, fully comprehended, it embraces the whole theory of justice, and it holds *in gremio* the ultimate doctrine of the δίκαιον, just as the μηδὲν ἄγαν does that of the μεσότης, and is thus unconsciously scientific in the highest degree. To the members of my own profession I need not point out its analogy with the *suum cuique tribuere* of Ulpian; and one of the objects of this work will be to show how entirely our whole duty, not only to our neighbours, but to God and to ourselves, is included in "paying our debts."

It is in these two doctrines, indeed (the μεσότης and the δίκαιον), more than in anything else, that the allegiance of the Socratic ethics to the central doctrine of humanity, and, as we shall see hereafter, their fruitfulness for scientific jurisprudence, mainly consist. But these, again, are the central

<sup>1</sup> See Sir A. Grant's interesting and valuable dissertation on "the Doctrine of the Mean," *Aristot.*, vol. i. p. 201 *et seq.*, and compare with the Confucian "Doctrine of the Mean," translated by Dr Legge, and above referred to, p. 124.

doctrines of the Socratic ethics. Amidst all the divergences which Plato and Aristotle, the two greatest expositors of the ethical problem, exhibit in the points of view from which they regard it, they are at one in regarding that problem itself as consisting in the realization of the harmony which nature demands as the condition of the free action of her various energies, and the full gratification of her various impulses; and in holding that this is to be accomplished by recognizing the measure of power which she herself has meted out to each.

If our previous remarks<sup>1</sup> are well founded, the attempt to establish a distinction between Plato and Aristotle, and to lay claim to the Stagyrte as "a judicious utilitarian,"<sup>2</sup> on the ground that he attached greater importance than Plato to the teaching of external observation, is a failure; for the distinction, when admitted, proves not different objects of search, but different methods of searching. Cicero asserts expressly,<sup>3</sup> that, as regards the doctrine here in question, Aristotle's view of nature did not differ from that of the other members of the Socratic school; and that, like Socrates—*excerare eum solebat qui primus utilitatem a naturâ sejunxisset*.<sup>4</sup> It would be easy to cite passages from Aristotle in confirmation of Cicero's view. The leading discussion is contained in the last four chapters of the Seventh Book of the *Nicomachean Ethics*. Several passages are not free from difficulty, but the drift of the whole plainly enough is that nature has in it something divine (πάντα γὰρ φύσει ἔχει τι θεῖον), and that happi-

<sup>1</sup> *Ante*, p. 49.

<sup>2</sup> Mill's *Liberty*, p. 46.

<sup>3</sup> *De Fin.*, iv. 24.

<sup>4</sup> *De Divinatione*, L. i. § 31.

ness consists in activity in accordance with nature. For the rest I may refer to *Ethic. Nic.*, i. ix. 5, x. ii. 4; and *Politic.*, i. i. 8, where he says expressly, ἡ δὲ φύσις τέλος ἐστίν; i. ii. 10, &c. Conformity or nonconformity to nature, throughout the *Politics*, is consistently adopted as the test of the qualities of different forms of government. Take, for example, such a passage as that at iii. xi. 10. Education he understands in its literal sense of a drawing out of the natural qualities of the individual, vii. xv.<sup>1</sup>

Nor does any substantial divergence arise from the fact of Aristotle's "being distinguished among the ancients," as Mr Leckie has said, "for the emphasis with which he dwelt upon the utility of virtue,"<sup>2</sup> for this merely proves the more hopeful view which he took of the affairs of this world, that he believed not only in the identity of virtue and happiness in the abstract, but in the possibility of realizing this identity, in a great measure, in human life. That Aristotle was an eudæmonist is admitted on all hands, but so was Socrates before him, and the Christian fathers and schoolmen<sup>3</sup> after him; and it no more follows therefrom that he was a hedonist like Bentham, than that, like Mr Mill, he believed in a method of investigating mental phenomena which excluded a direct appeal to the phenomena themselves.

<sup>1</sup> In these quotations and references I have used the Tauchnitz edition of 1831.

<sup>2</sup> As to Aristotle's conception of the relation between the *χρήσιμον* and the *καλόν* there is an instructive passage, *Polit.* iv. i., see also vii. viii.; and Thomas Aquinas, *Summa, Prima Secundæ*, quæst. xc. art. ii.

<sup>3</sup> Many excellent observations on this subject will be found in Professor Blackie's *Four Phases of Morals*.

More respect is due to Zeller's objection that, in the incomplete condition in which Socrates himself left his ethical theory, it furnished no external test of the character of the good, and had thus "the appearance of being founded on utility."<sup>1</sup> "Just as his speculative philosophy stopped with the general requirement that knowledge belonged to conceptions only, so his practical philosophy stopped with the indefinite postulate that actions must correspond to their conceptions. But how, with so vague a principle, can it be determined what actions are moral?"<sup>2</sup> The answer, I think, is that human life was viewed by Socrates as an action, which, like other actions, must correspond with its conception. The conception of human life, or, in other words, the idea of humanity, was thus the Socratic, as it had always been the natural human, and afterwards became in a conscious manner<sup>3</sup> both the Aristotelian and the Stoical standard of morality. Between such a theory, and the doctrine of the identity of the good and the useful, which Xenophon ascribes to Socrates, and which I believe him to have held, there is, as it appears to me, no inconsistency whatever.

In his essay on "the disagreement between the ethical systems of Kant and Aristotle,"<sup>4</sup> Professor Trendelenburg has discussed, with great acuteness, the relation in which Aristotle's system stands to all those systems, whether ancient or modern, in which happiness, in the sense of immediate gratification, is made at once the rule and the object of life. Kant does not mention Aristotle expressly, and Professor

<sup>1</sup> *Socrates and the Socratic Schools*, p. 129.

<sup>2</sup> *Ib.*, p. 123.

<sup>3</sup> Zeller, *ut sup.*, p. 128.

<sup>4</sup> *Vermischte Abhandlungen*, vol. iii.

Trendelenburg says that he knew him chiefly at second hand ; but the ground on which he is supposed to have insinuated the charge of hedonism was that Aristotle sought in human nature both the source of ethical determination and the object of ethical endeavour. " Know thyself, in order that thou mayest become thyself." In answer to this allegation, Trendelenburg has shown that the absolutely universal moral law, for which Kant contends (*das Allgemeine*), suffers no disparagement by being sought by man where alone it is discoverable by him—viz., in his own nature ; or by being realized, as alone he can realize it—viz., in the development of that nature itself. It is the old Aryan postulate of the existence of a divine element in man—claiming, and from his normal and general nature obtaining, a willing obedience, and rewarding it with happiness—which gives its ethical character to Aristotle's eudæmonism ; whilst, at the same time, it prevents his conception of virtue from assuming that hard and repulsive character which is common with so many moralists and theologians, and which even Kant has communicated to it. Of the consequences of thus thrusting human feeling aside and insisting on an absolute separation of the agreeable from the good, Trendelenburg has given a remarkable instance in Kant himself. Driven by the stern necessities of his system, he found himself compelled to limit the idea of duty to acts " unwillingly<sup>1</sup> performed," thus giving up the possibility of even an approximation to the realization of that very ethical "good-will," of which on other grounds he is justly regarded as the

<sup>1</sup> " Die Pflicht ist eine Nöthigung zu einem *ungern* genommenen Zweck." —*Metaphysische Anfangsgründe der Tugendlehre*, ix. p. 230.



apostle. There can be no "goodwill" if everything that is good must be done unwillingly.

It is in the integrity, the wholeness, and consequent sanity of the Socratic and Aristotelian ethics, and not in their exhaustive treatment of special questions, that their enduring value—one might almost say their novelty even for the modern world—consists. There and in the Bible alone are we consistently taught the "solidarity" of the divine and the human, of our highest and our lowest interests and enjoyments, and the consequent possibility of making "the best of both worlds," or rather the impossibility of taking what God intended for us, and what is really our own, out of either "world," apart from the other. When the distinction between eudæmonism as the harmonious gratification of our nature as a whole, including even the much-maligned "flesh," and hedonism as the excessive and disproportionate gratification of a portion of it, is as clearly maintained as Aristotle has maintained it, it appears to us that eudæmonism admits of being defended on somewhat higher grounds than Professor Trendelenburg, or even Professor Blackie has taken up. The coincidence of happiness and virtue, wherever happiness and virtue are really positive quantities, and not mere self-destructive negations, is not only possible but necessary. Happiness not in accordance with virtue is *more* than counterbalanced by its opposite, even in this world; and virtue which is not "its own reward"—*i. e.*, which is not a source of subjective happiness, whatever its objective value may be—has no subjective value at all. "The Lord loveth a cheerful giver;" and the spirit which He demands in giving a mite must govern the acceptance of the

martyr's crown. Trendelenburg, who is a consistent Aristotelian, has elsewhere shown<sup>1</sup> that vicious gratification consists, not in the gratification even of individual nature as a whole—for every sane human being is an epitome of humanity—and not in the harmonious gratification of all our propensities, including the lowest,—but in the rebellion and self-assertion of a part of our individual nature against the whole of it. It is a formidable risk to offer any opinion with reference to Aristotle which appears to be at variance with that presented in any portion of Professor Trendelenburg's writings, even when one seems to find encouragement from them elsewhere. But on this point, if we take the theory of the *μεσότης* alone, viewed as a doctrine of harmony and not of limitation, in the light in which Sir Alexander Grant has presented it,<sup>2</sup> and in which it was understood by Confucius long before Aristotle was born, it seems sufficient to warrant the conclusion that Aristotle recognized the necessary coincidence of virtue, not with the dicta of any exceptional faculty, but with the normal impulses of individual nature as a whole.

(b) *Rome*.—In so far as Stoicism is entitled to the character of a speculative doctrine, it belongs to Greece. But when we regard it in the aspect in which it was really important, that, namely, of an active faith—almost of a religion—our eyes instinctively turn to Rome. Its value to humanity, in this point of view, has been excellently brought out by Mr Leckie, and appears to have been strangely overlooked by Bunsen, with whose idealistic habits of thought it no doubt jarred.

<sup>1</sup> *Naturrecht*. See *infra*, cap. vi.

<sup>2</sup> *Ut supra*.

The Stoics were pre-eminently the custodiers and expositors of the severer ethical teaching of the Socratic school. By them the doctrine of human autonomy was formulated into practical rules of life, in the three directions of the Individual, the Nation, and the Community of Nations.

The more closely the history of ancient society is investigated, the more clearly does it appear that the Stoics were the Parsons<sup>1</sup> of paganism, as the Cynics have been said to be the monks of Stoicism. Notwithstanding the popularity of Epicureanism, and the many points of resemblance to Stoicism which it exhibited,<sup>2</sup> its professors never approached to the influence which the Stoical doctors enjoyed. And the reason was a very obvious one. So long as the path of life lies through the green pastures and by the still waters of self-indulgence, the ordinary instincts even of very ordinary men will enable them to find it and to follow it. But when the rugged steepes of self-sacrifice have to be surmounted, or the rude tempests of passion to be braved, loftier principles of action become requisite, and those who can call them forth are eagerly longed for. This task the Stoics undertook. Unlike the Epicureans, who shrank from the sterner realities of life, they professed to be friends in need, and pilots in the storm; and, as a necessary consequence, an unusual veneration attached to their persons, and an unusual importance to their maxims. It is not wonderful that men so situated should

<sup>1</sup> As to the idea of the Parson, or Persona, see Coleridge's *Church and State*, c. vi. p. 56, Pickering's ed.

<sup>2</sup> Even on the point which concerns us here, "the divine origin of the human race," they were at one with the Stoics. Zeller's *Stoics and Epicureans*, pp. 431-477.

have been credited with the invention of the doctrines which they inculcated; and we find, accordingly, that not only the general doctrine of the rectitude of the fundamental instincts of humanity, but still more its embodiment in the famous precept to "follow nature" (*ὁμολογουμένως τῇ φύσει ζῆν*,<sup>1</sup> *convenienter congruenterque naturæ vivere*), have been popularly ascribed to the Stoics. To the merit of calling attention to its practical application in many new directions, and, above all, in that of positive law, the Stoics are largely entitled; but to the character of discoverers, either in ethics or in natural law, there is no reason to believe that the Stoics had higher claims than the leaders of the Corn Law League might have set up to that of discoverers in political economy. Cicero, who was a direct inheritor of their traditions,<sup>2</sup> and was by no means disposed to be unfair to them, asserts not only that the theoretical doctrine in question was common to the whole Socratic school,<sup>3</sup> but fixes on the individual academic to whom the Stoics were indebted for the practical maxim. In the *Academic Questions* <sup>4</sup> he asserts that both Zeno and Arcesilas had been diligent hearers of Polemo. In the *De Finibus* <sup>5</sup> he repeats the same statement, and, speaking of the Stoics generally, he adds, *qui de rebus bonis et malis sentirent, ea quæ*

<sup>1</sup> The *τῇ φύσει* is said to have been an addition by Cleanthes to the original dogma of Zeno. If so, not Zeno but Cleanthes would be entitled to the character of the father of the Stoical ethics, for conformity must mean conformity with something. The *ὁμολογουμένως* alone would have been no more definite a guide than our own "utility;" it was the *τῇ φύσει* that gave it point. But the thought, if not the word, was, as we have seen, far older than either of them.

<sup>2</sup> There is an unbroken list of the Stoical doctors from Chrysippus to Posidonius, and Posidonius was master to Cicero.—Grant, p. 273.

<sup>3</sup> *Acad. Quæst.*, *passim*; *Nat. Deor.*, i. 7; *De Fin.*, iii. and iv.

<sup>4</sup> Book I. c. 9.

<sup>5</sup> Book IV. c. 22.

*ab hoc Polemone Zeno cognoverat*, having previously<sup>1</sup> asserted that what they did learn was *secundum naturam vivere*. The only two passages ascribed to Polemo himself, which have been preserved to us, fully bear out Cicero's statement as to the nature of his teaching.<sup>2</sup>

There is only one other point of historical importance in connection with Cicero's views to which I wish to call the attention of my readers—viz., the clear conception which he himself had of the fact that the end of life, and the method of its attainment, are equally revealed to us by nature; and that, consequently, the modified Stoicism which he taught was entitled to the character of science, both on teleological and methodical grounds. In the *Academic Questions*,<sup>3</sup> after mentioning the tripartite division of philosophy into ethics, physiology, and logic, as common to the Peripatetics and Academics, and derived by both from Plato, he thus expresses himself: “*Ac primam illam partem, bene vivendi, a naturâ petebant, eique parendum esse dicebant* (the rule of life), *neque ullâ aliâ in re, nisi in naturâ, quaerendum esse illud summum bonum, quo omnia referentur*” (the end).<sup>4</sup> Now utility may yield a method, but it can never yield an end.

The unspeculative, and, as a necessary consequence, the

<sup>1</sup> Book IV. c. 6.

<sup>2</sup> See Smith's *Dict.*, voce *Polemon*, and Madvig's *De Finibus*, p. 499.

<sup>3</sup> L. i. c. 5.

<sup>4</sup> There has been a tendency in Germany to disparage Cicero; but Hegelianism, at least in the person of its founder, cannot be charged with it. Hegel was fully alive to the scientific character of Cicero's method, and the advantage which it had over that of Grotius, *Philosophy of History*, Bohn's trans., p. 459. That Cicero took much of his information at second hand, and that, from the haste with which his treatises were compiled, he allowed himself to be betrayed into



one-sided character of the Stoics, which was so marked as to point them out as exceptional characters amongst their original countrymen, and which no doubt recommended them to the narrower and more practical mind of Rome, has been often remarked; but I am not aware that it was ever accounted for till Sir Alexander Grant pointed out the singular fact that, from the places of their birth, we may infer, with high probability, that they were mostly of Shemitic blood.<sup>1</sup> They were wanting in the subtlety which many Jews have exhibited. We shall seek in vain for a Spinoza or a Neander amongst them. Like the Shemites in general, they were intense and unsparing in the application of a narrow logic; but, as their premises did not rest on a sufficient analysis of internal phenomena, they ultimately fell away from the spirit of their own rule more egregiously than even their opponents. A departure from nature is the reproach which Cicero continually brings against them;<sup>2</sup> and there can be little doubt that the Cynic who lived in a tub, or the Stoic who committed suicide, outraged nature even more flagrantly than the Cyrenaic or the Epicurean who sipped nectar on a bed of roses, and was true at least to his lower instincts.

It is their betrayal of this, their own principle, too, as we

inconsistent expressions, is, I fear, unquestionable. The expression *Prima naturæ* (τὰ πρῶτα κατὰ φύσιν), whencesoever it may have come (Madvig, *ut supra*, *Excursus*, iv. p. 815), is certainly unfortunate; and specially so if we forget, as we are apt to do, that both *πρῶτος* and *primus* often mean "first in rank and importance," rather than first in actual time. Probably *ultima naturæ* would have better conveyed, to most of us, what was no doubt Cicero's conception of the fundamental, radical impulses, which he accepted as the rule of life.

<sup>1</sup> *Aristot.*, vol. i. p. 246.

<sup>2</sup> *De Fin.*, iv. c. 11 and 19; *Pro Murena*, c. 29, 30, 31.

shall see hereafter (cap. vi.), which gives point to the polemic which Sir Alexander Grant has directed against Bishop Butler's famous "apologia" for Stoicism. In so far as Sir Alexander's attack is directed against the maxim "follow nature," in itself—*i.e.*, in its wider and Socratic as opposed to its narrower and Stoical sense—it is an attack on science itself; and I wish that the learned Principal had marked the two points of view more clearly than he has done. Johnson's whimsical chapter in *Rasselas*, on "the happiness of a life led according to nature," has often been ignorantly regarded as a *reductio ad absurdum* of the Stoical maxim. But when the Prince of Abyssinia demanded of the philosopher that he should tell him what nature was, he only reminded him of the task which his profession as a philosopher imposed on him. The vagueness of the philosopher's response proves, it is true, how small was the advance which moral and political science had made in England in Dr Johnson's time, or rather how imperfect was Dr Johnson's own knowledge of it—for we must not forget that he was the contemporary and personal friend of Edmund Burke. But what should we think of a chemist or a physiologist who should decline the challenge to fight on the field of nature, in our day? Nature may be a mistress who is not wooed with equal facility by all her suitors; but her wooing, in all departments alike, is the condition of science, *sine quâ non*.

I shall have occasion to point out hereafter<sup>1</sup> the imperfections of the Socratic doctrine in the aspect in which the Stoics presented it. But inasmuch as the practical recognition of

<sup>1</sup> Cap. vi.

a doctrine by mankind, their acting consistently as if they believed it, is a more unequivocal proof of their belief than any expression of opinion, either direct or indirect, it may not be unimportant to this branch of the discussion that we should dwell for a little on the vast acceptance which Stoicism experienced, and the influence which it exercised. With the single exception of Christianity—from which, in the point we are considering, it does not differ<sup>1</sup>—no form of belief ever took possession of so great a number of Europeans, or held it so long; and though it was not particularly fortunate in its expositors, or distinguished by the subtilty, or even the soundness, of its analysis of human nature in detail, it moulded human institutions and affected human destiny to a greater extent than all the other philosophical systems either of the ancient or modern world. In Greece the objections which presented themselves to the physical and metaphysical speculations on which the Stoics pretended to found their ethical system, seriously affected its influence; but in Rome these were not understood, and if they had been understood would not have been heeded. Accordingly, during the youth and vigour of the Republic, it ruled Roman life unconsciously before it had any theoretical footing at all; during the period of bloom it held its own against Epicureanism amongst the better spirits; and when finally, as a rule of citizen life, it experienced the relaxing and deadening influences of the empire, it kept alive, as the prevalent theoretical opinion, the idea of virtue as the chief good, and the aspiration after liberty within the sphere of individuality, and the idea of universal

<sup>1</sup> *Infra*, p. 161 *et seq.*

charity and cosmopolitan benevolence, as the means to its attainment.<sup>1</sup> Nor ought it to be forgotten that when social corruption and degeneracy had reached their culminating point, and the world of antiquity was about to expire, the last words which she addressed to her successor, the advice which guided the spirit of the middle age and moulded its institutions—its asceticism, its chivalry, and even its romance—consisted in the inculcation of Stoicism. The famous work of Boethius, like the system which it taught, owed very little either to the abilities of its author, or to the speculative value of its subject-matter; to us, it is a disappointing book; and yet, for nearly a thousand years, it enjoyed a reputation such as perhaps never fell to the lot of any other confessedly human production. Composed in his prison at Pavia, where he was confined for the crime of having “hoped for the restoration of Roman liberty,” by him whom Gibbon has characterised as “the last of the Romans whom Cato or Tully would have acknowledged for their countryman,”<sup>2</sup> it formed one of the most important connecting links between the classical and the Christian world; and, as regards the history of our own English civilization, it is a fact of no insignificant importance that the task of presenting it to our countrymen in the vernacular speech was undertaken, successively, by Alfred, by Chaucer, and by Queen Elizabeth! Whether Boethius was a Christian or a pagan is still a subject of dispute. His name, like that of Buddha,<sup>3</sup> was enrolled amongst Catholic saints and martyrs;

<sup>1</sup> How much nobler than the idea of the *point d'honneur* which M. Prevost Paradol said was the only remaining conception of virtue in the mind of a Frenchman.

<sup>2</sup> vii. c. xxix. p. 45.

<sup>3</sup> *Ante*, p. 107.

but the theological works ascribed to him are probably the work of another, and there is, at any rate, no evidence of their authenticity at all sufficient to counterbalance the fact that Christianity is never once mentioned in the *Consolatio Philosophiæ*, the topics discussed being such as to render its accidental omission almost impossible. Like many of the more serious men of his time, and even like Epictetus and the Antonines of a former time, Boethius probably hovered on the confines of both faiths. But, in his relation to the one and to the other, there would seem to have been this difference, that, whilst he may have been unconsciously affected by the Christian elements that pervaded the moral atmosphere which he breathed, he was a direct and conscious inheritor of the Ethics of the Porch. But the work of Boethius, and the innumerable commentaries, translations, and imitations which it produced—*c.g.*, Chaucer's *Testament of Love*, and the *King's Complaint*—were by no means the only reproductions of degenerate Stoicism that fed the spirit of the middle ages. The meditations of Marcus Aurelius were never forgotten; and the *Disticha de Moribus*, or *Catechism of Morals*, ascribed to a certain Dionysius Cato, of whom nobody has ever been able to discover anything, was extensively used as a school-book from the age of Alcuin downwards. It is frequently quoted by Chaucer, and no wonder; for so popular was it about his time, that more than thirty editions were published in the fifteenth century.<sup>1</sup> It was in imitation of these expiring efforts of Stoicism that the *Summa* of the schoolmen and casuists began

<sup>1</sup> See Merivale's *Rome*, last vol.; Stanley's *Eastern Church*, p. 228, and his article on Boethius in Smith's *Dictionary*.



to be composed—of which the *Summa* of Thomas Aquinas is the noblest specimen; and they in their turn gave rise to the Spanish Theological Jurists—Dominicans and Jesuits—who were the predecessors of Grotius, Soto, and Suarez of Grenada.<sup>1</sup>

The substantial accordance of the Socratic ethics, even in the peculiarly exaggerated and one-sided form of Roman Stoicism, with the old revelation of nature on the one hand, and the new revelation of the Gospel on the other, accounts for the fact of its having survived the marvellous and miraculous revolution of opinion in which polytheism perished. Chronologically, as well as philosophically, Socraticism, or rather that universally human doctrine of which Socrates was the prophet to the western branch of the Aryan race, forms, as I have said, the connecting link between the ancient and the modern world. To trace the various forms in which this connection manifested itself belongs to, or rather constitutes, the history of ethics and jurisprudence, and all that we can here attempt is to indicate a few additional points of view which specially claim attention.

1. *The Roman Law.*—The civil law of Rome, which, during the abode of our Lord on earth, received His constant tacit and occasionally His express approval, and which the Christian accepted from the heathen world, makes no claim to direct inspiration, but is professedly founded on the revelation through nature, and the consequent assumption of human autonomy.

Its general character is post-classical: in many respects it

<sup>1</sup> *Infra*, p. 165 *et seq.*

is national: and, in the form in which we know it best, it comes to us from Christian times; and yet, in the respect I have mentioned, it entirely falls in with the central tendency of Hellenic and Indo-Germanic thought. The great practical people of antiquity had the wisdom and happiness to repudiate the sensationalism and empiricism which constitute the reproach of our country and our time, and which hitherto have prevented the jurisprudence of England from attaining the character of a science. The foundations of the Roman law were laid deep in the study of nature, both in its subjective and objective manifestations. Like the Christian Apologists and Fathers, the Roman jurists accepted the Socratic ethics, chiefly in the form in which the Stoical doctors presented them. The two centres around which their whole system of rights and obligations grouped themselves were the *persona*—i.e., the rational and responsible *ego* and *non ego* on the one hand—and the *res*, the irrational and irresponsible *non ego*, animate and inanimate, on the other. Of the logical rigour with which the rights of the *persona* were guarded, we have a remarkable illustration in the fact, that the Roman theory of slavery rested, not on a denial of liberty to the person, but of personality to the slave. The slave was regarded not as a *persona*, but as a *res*. By nature he was admittedly a *persona*, a free man, and as such incapable of belonging to another; but, by a fiction of law, he was declared a *res*, in order that, like an ox, or an ass, or a movable chattel, he might be capable of being held as property. The foregoing conclusion in favour of slavery was thus reached without sacrificing the logic of the civil law. A false premiss was devised which

contradicted nature, and separated law from fact. It was by a similar expedient, as we shall see hereafter, that Hobbes saved the logic of his political system,<sup>1</sup> when, with contemptuous cynicism, he threw the fiction of absolute equality, like an apple of Sodom, into the midst of mankind. The jurist and the politician were alike accurate in their estimate of human intelligence. Both of them knew how much commoner is the gift of reasoning than of reason, that fictions to many are as good as facts, and that for one man who can discover a false premiss, there are fifty who can point out a false conclusion. The fiction of the one justified slavery for ages to the Roman world; the fiction of the other still justifies democratic imperialism to many in our own day. In one respect, however, they differed; for it was the jurist alone who, in virtue of his Stoical training, had the grace to acknowledge his error, and to admit that his doctrine was *contra naturam*.<sup>2</sup> It is wonderful that Aristotle, having got hold of the principle of relative equality,<sup>3</sup> did not apply it to the subject of slavery, for, as Professor Trendelenburg has truly remarked, his conclusion in favour of slavery<sup>4</sup> is not warranted by his assumption that some men are by nature more suited for servants than for masters.<sup>5</sup> That is an assumption which there is every reason to believe is warranted by nature, and in dealing with inferior races, it might very well have been held to justify servitude, in the sense of perpetual pupillarity. Whether Aristotle intended to push it greatly

<sup>1</sup> *Infra*, Book II. chap. iii.

<sup>2</sup> *Dig.*, 1. 1. 1, § 4 (*Ulp.*); 1. 1. 5, pr.; *Inst.*, 1. 3. 2.

<sup>3</sup> *Infra*, Book II. chap. iv.      <sup>4</sup> *Naturrecht*, i. c. 2.

<sup>5</sup> *Politic.*, i. c. 2.

beyond that point is rendered somewhat doubtful by a passage in the First Book of the *Œconomics*. This Book, at all events, I believe is acknowledged to be his, and in it he argues that liberty should be held out to the slave as an ultimate object, on grounds not only of expediency but of justice.<sup>1</sup>

The recognition of the legitimacy of infanticide by Aristotle,<sup>2</sup> and in the Twelve Tables, is a stronger instance than even that of slavery, of want of appreciation by antiquity of the value of the *persona*, the sacredness of humanity as such. It must ever redound to the glory of the Stoics that they were the first explicitly to proclaim the unity of the human race, whilst they avoided the sin and folly of laying claim to an equality which God has denied. It was this latter error which in the East degraded the natural distinction of classes into the unnatural distinction of castes; which, in classical times, and in the dealings of modern nations with the inferior races, has aggravated servitude into slavery; and which, in our own day, by denying the rights of private property, has invaded the sanctity of the *persona* in the name of liberty, and threatens to arrest the progress of God's kingdom by repudiating the means which He has appointed.

2. *International Law*.—*International jurisprudence owed its origin to those who were the special expositors of the doctrine of human autonomy in antiquity, and has always rested on the assumption of its truth.*

The advantages of the rational and philosophical conception

<sup>1</sup> *χρή δὲ καὶ τέλος ὀρίσθαι πάντων. Δίκαιον γὰρ καὶ συμφέρον τὴν ἐλευθερίαν κείσθαι ἄθλον. Βούλονται γὰρ πονεῖν, ὅταν ἡ ἄθλον καὶ ὁ χρόνος ὀρισμένος.*—i. c. v.

<sup>2</sup> *Politic.*, vii. c. 16.

which the Romans formed of the sources of jurisprudence were not confined to the development of a municipal system which, after the lapse of ages, still illuminates the path of modern legislation. The idea of the *persona* was felt to contain the germs of that cosmopolitan system, the realization of which the ancient world was not privileged to behold, and which we ourselves, even now, have seen but in part. The sentiment of a brotherhood of mankind is one of those innate conceptions which belong to humanity as such. Were its absence conceivable from any sane mind, we should be compelled to relinquish our doctrine of the necessary recognition of the rights of the *non ego*, and to accept Hobbes's dreary conclusion of a natural state of war.<sup>1</sup> It is not surprising, then, that oriental scholars should have found it in Buddha and Confucius, that Bunsen should have traced it in Homer,<sup>2</sup> or that he should maintain that it "underlies all the Mosaic superstructure."<sup>3</sup> Like all that was true in Stoicism, moreover, it had its roots in the more catholic creed of Socrates. Still, in this direction especially, the Stoics surpassed their master. It is impossible not to see in Zeno's universal state, and in the cosmopolitan notions of the Stoics as a school, a clearer presentiment than any their greater predecessors possessed of the possibility of a system of international law; and as regards the Roman jurists,

<sup>1</sup> *Infra*, Book II. chap. iii.

<sup>2</sup> *God in Hist.*, vol. ii. p. 104.

<sup>3</sup> *Ib.*, vol. i. p. 95. There can be no doubt that the idea of the unity of mankind is involved in the doctrine of man's participation in the divinity of one God. But Bunsen acknowledges that any special hold on it which the Jews may have had in this direction was lost when the Jewish nation "set itself up, in contradistinction to mankind at large, as the elect people of God," and that it did not again obtain prominence till the coming of Christ.



it is instructive to remember that it was through them, as apostles of the doctrine of personality, that the seed which the Stoics had sown ultimately germinated. Grotius was not himself specially a civilian, but he was born in a family and bred in a school saturated to the core with the doctrines of the civil law; and in a family and school, moreover, in which these doctrines were sedulously studied in connection with Greek philosophy. Of his more eminent successors, including Lord Stowell, similar assertions might be made. In this country we have few names that deserve mention, either in scientific jurisprudence or in international law. But many of our municipal lawyers have been great; and the greatest of them—Lord Mansfield and our own Lord Stair—have freely acknowledged their obligations to these heathen prophets. The utterance of Lord Mansfield, with reference to Socrates, is very memorable. “I will take the liberty to call him the great lawyer of antiquity, since the first principles of all law are derived from his philosophy.”<sup>1</sup>

(c) *Alexandria*.—The central doctrine of the Socratic ethics met with acceptance at Alexandria, even from persons who were not of pure Aryan blood.

This was a direction in which speculative thought assumed a subtler and deeper aspect than in the Roman world. At Alexandria the traditional doctrines of the Socratic school as to the sources of ethical science, in place of being limited and rendered more definite by being viewed exclusively as a revelation in and through humanity, held by the characteristics to which Plato had given partial recognition, of a revelation

<sup>1</sup> Lord Campbell's *Lives of the Justices*, vol. ii. p. 391.

to humanity. But though in laying claim to illumination, Neo-Platonism offered meeting-points not only with the old Shemitic traditions, but ultimately with Christianity, this side of its teaching manifested itself in features<sup>1</sup> so exaggerated, and often so entirely sensuous, as to alienate the professors of a pure and spiritual faith. It was the common ground on which their ethical systems rested which enabled the Christian Fathers to join hands with the saner teachers of the old philosophy, and to perceive the identity of object, and even in many respects the analogy of method, which bound together all genuine and honest seekers after truth. Even the learned Jews, who contributed so characteristic an element to the intellectual life of Alexandria, and formed, as it were, a connecting link between Christians and heathens, accepted the common anthropology of nature, and in them it yielded the same practical results. Professor Trendelenburg, in his *Naturrecht*,<sup>2</sup> remarks that Philo had imbibed Stoical notions, and mentions, as a consequence, that he condemned slavery as contrary to nature. The same belief in the rectitude of human nature which led the jurists at Rome to the idea of the indefeasible and inalienable dignity of the person, thus led the typical representative of old Jewish culture at Alexandria beyond them, to one of the most important practical consequences of that idea, and one which, as we have just seen, the jurists failed to derive from it. In like manner Clement, though professedly an eclectic, was more of a Stoic than anything else, as indeed were all those who opposed the dualism

<sup>1</sup> In extravagances somewhat resembling our table-turning and spirit-rapping.

<sup>2</sup> P. 157.

of the orientalized Gnostics on the one hand, and the blind faith in continued and miraculous interposition, held by the Montanists and the narrower Christian sects on the other.

(C) *Shemitic and Christian Anthropology.*—*The belief in human autonomy constitutes the common element of heathen and Christian faith; or, in other words, of the revelation with reference to humanity which God has given through human nature, and to human nature.*

We have now reached the point at which Aryan came into immediate contact with Shemitic thought, and at which the creed of God-created and God-developed is tested by that of God-instructed humanity. And the question which we have here to ask of history is, not whether the anthropological doctrines of reason and revelation agreed in all respects, or wherein they differed, but simply whether they coincided in asserting the autonomous character of humanity. If the answer be in the affirmative, it is manifest that the adequacy of the natural sources of jurisprudence is affirmed, and, as a necessary consequence, the exclusive pretensions of the theological school are shut out.

(a) *The Bible.*—Now, as regards the doctrine in question, there is no essential discrepancy between heathen opinion and the teaching of the Holy Scriptures. "God created man in His own image, in the image of God created He him."<sup>1</sup> That is the original statement, and the doctrinal teaching of the Old Testament mainly consists of its continual reassertion. When we turn to the New Testament, in the passage

<sup>1</sup> Gen. i. 27.

in St Luke's gospel<sup>1</sup> which sets forth the human pedigree of Christ, we are again told that "Adam was the son of God;" and St Paul, preaching at Athens, brought the identity of Christian and heathen belief on this point expressly before his hearers, by referring to the heathen poets in support of his assertion, that "we also are His offspring."<sup>2</sup> Nor is this primary conception of the essential relation between the Divine and the human, and the consequent autonomous character of the *persona*, invalidated by the intervention of voluntary transgression. The assertion that this parental image, marred and defaced but not obliterated, is traceable in himself by every subsequent member of the family, is consistently maintained. It was as the Son of Man that the Son of God appeared on earth, and encouraged the greatest sinner to address His and Our Father in heaven.

(b) *The Fathers*.—It is not wonderful, then, that the Christian apologists accepted "the morality of Socrates as healthy and sound,"<sup>3</sup> or that the apostles themselves should have made use of the very expressions in which the followers of Socrates had clothed his ethical consciousness. We find, accordingly, that it was the belief of Justin Martyr, and Clement of Alexandria, and Origen, and in general of the orthodox fathers of the Church, just as it had been of Plato the Greek and Philo the Jew, that the Divine Logos, which was present at the creation of man, was not alien from the human Logos.<sup>4</sup> Nor did they hesitate to apply to the latter

<sup>1</sup> iii. 38.

<sup>2</sup> Acts xvii. 28.

<sup>3</sup> Donaldson, *Hist. of Chris. Lit. and Doctrine*, vol. ii. p. 26.

<sup>4</sup> Neand., *Ch. Hist.*, vol. ii. p. 423.

the very same epithet (λόγος σπερματικός) by which heathen philosophers had characterized it.<sup>1</sup>

"The Logos," says Justin Martyr, "was present at the creation of man," and "the whole race of men partook of Him." . . . "He is in every one." "The seed of the Logos is implanted in the whole race of men, and those who lived with the Logos were Christians, even though they were reckoned atheists — such as among the Greeks, Socrates, Heraclitus, and men like them; and among barbarians, Abraham, and Ananias, and Azarias, and Misael, and Elias, and many others."<sup>2</sup> In proof of how entirely this view is in accordance with best modern theological opinion, I might quote to any extent not only from the writings of the "Broad Church party," but even from such works as Mr Newman's *Arians*, which was published before that party existed.<sup>3</sup> I shall content myself, however, with referring to the second Book of Bunsen's *God in History*; and quoting a couple of passages from Neander, in which he has expressed, very definitely, the opinion which pervades all his writings.

"Christianity proceeds on the assumption that all the tendencies which belonged to the original idea of humanity, and which had been distorted and circumscribed by sin, are to be realized. This is what is meant by the saying of Christ, that He was come not to destroy the law but to fulfil it, which must not be understood as having reference only to the law of the

<sup>1</sup> Zeller's *Stoics*, p. 162. Bunsen, *God in History*, vol. ii. p. 316.

<sup>2</sup> Donaldson, *ut sup.*, vol. ii. p. 225.

<sup>3</sup> It was published originally in 1842, and reprinted, with the author's permission, by the Rev. G. H. Forbes of Burntisland, whose much learning did not lead him in the direction of the Broad Church.



Old Testament." In commenting on the miracle at Cana of Galilee, he thus sums up his conception of its import: "It is the peculiarity of Christ's spirit and labours, the peculiarity of the work of Christianity, not to destroy what is natural, but to ennoble and transfigure it; to enable it, as the organ of Divine power, to produce effects beyond its original capacities. To energize the power of water into that of wine, is, indeed, in every sense, the peculiar office of Christianity."<sup>1</sup>

<sup>1</sup> *Geschichte der christlichen Ethik*, p. 17. Nor does there seem any reason why this process of the gradual realization of the human idea, even as regards its manifestation in separate individual existence, should be confined to this life. The strongest argument for the existence of the *individual* soul after death, has always seemed to me to consist in the undeveloped possibilities which manifestly belong to it. Individual peculiarities are not faults in our nature: they belong to it normally; they are part of its original conception, of its idea; they are constituents of the Ego, just as much as those which it possesses in common with existence in general. Why then should not these constituents of each ideal Ego survive, and receive more perfect realization, like its other constituents? If cessation of existence, in the sense of annihilation, be unthinkable as regards the whole, why should it be thinkable as regards the part. The pantheists say that the Ego survives, not as a separate Ego, but as a constituent of universal existence. But if separation, peculiarity, individuality, belong to the conception of the Ego, how can the Ego subsist without them? Or how can humanity subsist only as a whole, *in general*, if the very conception of it be that it is something which is made up of parts possessing special characteristics which must perish when the individuals of whom they are the characteristics no longer subsist? The analogy of a drop returning to the ocean, so often used by pantheists, is nothing to the purpose, because separation into drops forms no *necessary* part of our conception of the sea, whereas separations into individuals does form a necessary part of our conception of humanity. It is separability, not separation, which belongs to the conception of water. We can think of a bucket of water apart from the drops into which it might be divided. But separation into individuals belongs to the conception of humanity. We cannot think of a mob apart from the individuals into which it must be divided. You can have tea-cupfuls of water, table-spoonfuls of water, &c.—the unity is arbitrary—but you can only have individuals. When you come to human existence the unity is necessary. You cannot have half a man, or a mob composed of legs, or arms, or heads, or feet. To annihilate individuality, therefore, is to annihilate that which consists of individuality;

(c) *The Schoolmen and Ecclesiastical Jurists*.—No mistake could well be greater than to set down the ecclesiastical writers on jurisprudence, previous to the Reformation, indiscriminately, as holding the opinions of such men as Bellarmine<sup>1</sup> and Molina, and consequently as representatives of the theological school, in the sense of a school which ignores any source of knowledge except direct revelation, as interpreted by the Church. We think of all these men mostly as monkish ascetics, who had renounced this world for the next, and whose prayer was not for “the garish day”<sup>2</sup> of knowledge, but for guidance in a night of voluntary ignorance. It is true that the idea which lies at the root of all asceticism and fanaticism, whether Catholic or Protestant, whether heathen or Christian, is always the repudiation of the teaching of nature in its integrity. The hermit in his cave, or the anchorite on his pillar, was a natural infidel, just as much as the cynic in his tub; and it is to be feared that the Protestant

and our choice seems to lie not between separate existence and pantheism, but between separate existence and “Nirwāna,” in the popular sense of annihilation—“blowing out.” The objection to this argument, of course, is that to some extent it is applicable to individuality as manifested in the lower animals, or even in plants. It proves too much.—See the end of Sir A. Grant’s article on Grote’s *Aristotle* in the *Edinburgh Review*, October 1872.

<sup>1</sup> Bellarmine “used his influence over Pope Clement VIII. to prevent the introduction of the Platonic philosophy into the University of Rome, on the ground that it was pernicious; and held the Pope to be the supreme authority in morals as well as in doctrine.”—*Disputationes*. See Chambers’s *Encyclop.* v. *Bellarmino*. Molina wrote a commentary on the *Summa* of Thomas Aquinas, and an elaborate treatise on Justice and Right, which I do not know. I am consequently not entitled to speak of him. But if Bellarmine said that, “if the Pope declared vice virtue, or virtue vice, we were bound to believe him,” it is clear that *he* left no ground for natural jurisprudence to stand on.

<sup>2</sup> Newman’s hymn, “Lead, kindly Light.”

in his pulpit is not always free from the same reproach. But it is to normal and sane, and not to one-sided and crack-brained representatives of doctrines that we must look for their exposition. Saint Anthony and Saint Simeon were no more entitled to be regarded as exponents of the theology or anthropology of the Church, than Diogenes was to be regarded as a representative of the Socratic school, or a Ranter or a Shaker at an American revival to be taken for a normal Protestant. But even to the sanest of the ecclesiastical jurists, it will be said, the Church took the place of nature, just as to ecclesiastical theologians she took the place of the Bible; and as the Church, moreover, was her own interpreter, their jurisprudence must thus have formed part of a theological system which excluded any ultimate appeal to reason or to nature, even in secular questions. It is this view, I am persuaded, that has handed over to "the moth, the worm, and the spider,"<sup>1</sup> more than one work of genius and learning on the subject of our present studies, to which the modern literature, even of Germany, scarcely furnishes parallels. The allegation that the finality which the Church asserted for her dogma, even as regarded secular opinion, had the effect of excluding the laity from free anthropological as well as theological inquiry, is no doubt true; and it is this fact which, down even to our own day, seems to render the existence of Roman Catholicism and political autonomy irreconcilable.<sup>2</sup> In Germany they are resisting each other like oil and water, and in Italy and in Belgium they are

<sup>1</sup> Hallam, vol. i. p. 373.

<sup>2</sup> M. Renan, viewing it chiefly from its political side, speaks of the Reformation as "la plus belle chose des temps modernes."—*La Réforme Intellectuelle et Morale*, p. 129.

anything but reconciled. But in earlier times, except when it gave rise to political antagonism, the dogma of the Church did not affect either the methods of inquiry followed by the clergy themselves, or the results of these inquiries, to anything like the extent that is generally supposed; and this for the simple reason that the clergy were the Church. Beyond a certain point, tradition was binding on the clergy themselves, just as the admitted words of Scripture are binding on modern theologians. Even Saint Thomas Aquinas could not contradict Saint Augustin. Before he ventured to differ from him he must explain him away. But, if the point chanced to be one on which Saint Augustin neither required to be contradicted nor explained—if Saint Augustin said that there was a revelation of law through nature as well as to nature,<sup>1</sup>—then to nature Saint Thomas could go. The door of science was open to him. He could pronounce nature to be an immutable guide to truth.<sup>2</sup> He could seek for a natural law for the government of the human relations; he could work out its realization in time and place; and this he could do by the observation either of subjective or objective phenomena. Now this was precisely what took place. Not Saint Augustin alone, but the whole of the Fathers of the Church, maintained, as we have seen, the continued presence of the divine element in humanity. This element it was the function of Christianity to evoke and potentiate; and its subjective utterances, consequently, whether through the individual consciousness or that of the race, formed a portion of the dogma on the strictest

<sup>1</sup> See the *De libero arbit.*, i. 6, quoted *Sum.*, *Prim. Sec.*, *quæ.* xci. art. iii.

<sup>2</sup> *Veritas rerum naturalium immutabilis est*, *Prim.*, *quæ.* xvi. art. viii.



principles of orthodoxy.<sup>1</sup> Armed with this authority, and true to the instincts of the Aryan race, the general problem which the Schoolmen set before them was the reconciliation of theology and philosophy, of faith and reason; a problem, the mere statement of which amounted to an assertion of the fundamental rectitude of humanity, and the validity of indirect or subjective, equally with direct or objective, revelation.

Nor, on the assumption that truth is one, that, as Neander<sup>2</sup> has finely said, "there is no schism in the spirit," was their position as honest seekers for truth affected by the allegiance which they owed to the Augustinian maxim that "*fides præcedit intellectum*," or by the fact that they began their investigations from the theological and not from the philosophical point of view. It was in the fullest confidence that reason had nothing to reveal which faith need fear, that Anselm wrote his *Fides quærens intellectum*; and that Abélard, bolder still, pronounced Christianity to be a *Reformatio juris naturalis*, composed a work on ethics to which he gave the significant title, *Scito te ipsum*, and maintained that "the old philosophers came very near to apostolical perfection, and were not very far, if at all, removed from Christianity."<sup>3</sup> Abélard, it is true, was condemned as a heretic; but the vast popularity of his teaching, and the influence which it exercised even on his opponents, showed to how great an extent his sentiments were in accordance with the spiritual consciousness of his time.

<sup>1</sup> "Catholica fides non solum docet, quatenus parendum est Deo, supernaturaliter præcipienti, sed etiam quid natura vetet, jubeat, vel permittat."—Suarez, *de Legibus*, ii. c. v. and vi.

<sup>2</sup> Vol. viii. p. 19.

<sup>3</sup> Neander, vol. viii. pp. 41, 42.



We find, accordingly, that the characteristic of the third period of scholasticism, from Alexander of Hales to Occam, which included the brilliant era of Thomas Aquinas, was a complete alliance between the Church and the Aristotelians—a proclamation of the doctrine that the truth of reason is essentially one with divine truth, and that, as Neander, following Thomas Aquinas, has somewhere said, “The Christian graces of Faith, Hope, and Charity, are but the complement of the old cardinal virtues of Prudence, Justice, Temperance, and Fortitude.”<sup>1</sup>

It is a striking proof at once of the universality of this belief, and of the influence of philosophical on theological studies, that, in defiance of the exclusive tendencies of Shemitic thought in the direction of the supernatural, the Arabian scholars of this period became anxious to discover a scientific basis for their creed also, and sought to perform for the Koran the same office that Christians were performing for the Bible.

Grotius is often credited by his admirers with the merit of having separated jurisprudence from theology, and vindicated for the former the character of a secular science. The statement is true in the sense of his having been the earliest Protestant writer of importance on the subject; and having, as such, contended against the political subordination of the laity to the clergy, and of the State to the Church, for which the Spanish Jesuits, who were his immediate predecessors, had argued so keenly.<sup>2</sup> But it is anything but true

<sup>1</sup> As to the relation between them, *v. Sum., Prim. Sec., quæst. lxi.*

<sup>2</sup> When Suarez, in arguing for the divine origin of the civil law, lib. iii., sums

in the sense of his having separated the human element in jurisprudence from the divine, or having discovered, or sought to discover for it, any other basis than that which these writers had ascribed to it. The divine character of that law of nature to which he appealed as his ultimate authority, is the key-note of Grotius throughout; whilst, on the other hand, the coincidence of the *lex divina* with the *lex naturalis*, and of both with the *lex humana*, finds no fuller recognition in any part of the writings of Grotius than in those remarkable chapters of the *Summa* in which Thomas Aquinas treats of laws,<sup>1</sup> in Dominic Soto's treatise *De Justitia et Jure*, or in Suarez of Grenada's *De Legibus et Deo Legislatore*. That Grotius did much to develop those cosmopolitan conceptions of justice which we have traced to Socrates and the Stoics, and with which the ecclesiastical writers — Suarez in particular<sup>2</sup> — were well acquainted, is beyond all dispute. But it may be doubted whether the study of jurisprudence, as a science of nature, gained anything very important, in point of method, from his labours,<sup>3</sup> and the neglect of the true method is a reproach which may be urged with far greater justice against those who came after him, than against those

up with the exclamation, "Non immeritò, igitur, sub hâc saltem ratione, omnium legum discussio est Theologicæ Facultatis," it is impossible, knowing who he was, not to suspect that he was influenced by considerations which were not exclusively scientific.

<sup>1</sup> *Prim. Sec., quæst. xc.-c.*

<sup>2</sup> *ii. c. xvii. and xviii.*

<sup>3</sup> Grotius's claim to be the discoverer of the inductive method in jurisprudence is on a par with that of Bacon to be the discoverer of the inductive method itself. As to the latter, see Sir David Brewster's opinion, stated in a letter so early as 1824—*Life*, p. 128 *et seq.*—and afterwards repeated in his *Life of Newton*. It is surprising for how many good things Grotius and Bacon got credit from the

who went before him. The device of founding jurisprudence on "contracts" and "conventions" dictated by personal or national conceptions of "utility," was reserved for the eighteenth century; and it was the prophets of the nineteenth century, and of our own country, who first addressed themselves to the lofty and enlightened task of "modifying," "adapting," and "limiting" the law of nature!<sup>1</sup> Grotius seized the true spirit of the Baconian teaching, and there can be no doubt that it influenced his own very favourably. But it is difficult to imagine that he derived much help from the little work which Bacon devoted expressly to the subject. It is entitled, *De Justitia universali sive de fortibus Juris*; but it does not fulfil the promise of its title. It consists of a series of aphorisms, exhibiting much shrewdness, of course, but very slenderly linked together, and making no claim to the character of a system.

(d) *The Reformation*.—If the merit of Grotius, like that of Bacon, consisted, not in the invention of any new or separate method of inquiry, but in giving a wider range of application to the method from which no man of real insight had ever departed—the method, namely, of investigating nature as the only ultimate standard, or possible organ of truth—his position, in this respect, did not differ from that of European thinkers generally since the time of the Reformation. The single doctrine of "Les carrières ouvertes"—let nature have

ignorance of their readers—*c.g.*, the saying that "peace is the object of war," is generally ascribed to Grotius; but Aristotle, at any rate, had said πόλεμον μὲν εἶρηνης χάριν (*Politic.*, lvii. 112), and I am pretty sure that oriental predecessors could be found for both of them.

<sup>1</sup> *Infra*, cap. ix.

her way—sums up not only all the truth of the Revolution, but all the novelty of the Reformation.

Nature, since the Reformation, in Protestant countries at all events, has hidden her face from no one. In all directions the artificial barriers to inquiry were then broken down. All reapers were welcomed to the harvest of science. Each man was not only permitted to think and labour for himself, but was called upon to think and labour for all, each according to the measure of his powers. But the field on which they were to labour was the old field of nature, and the tools they were to use were the old tools of natural reason. The field was wide enough for all, and no one was so weak that he might not pick up a straw, or break a clod. But the mischief was, that, as all rushed in indiscriminately, the newcomers impeded the work nearly as much as they forwarded it; and modern cultivation, in politics and jurisprudence more especially, has consequently resembled the heaving to and fro of a mob, rather than the onward march of a disciplined army. In politics, the autonomy of all has been proclaimed; but its realization has been hindered by the claim for the equal autonomy of each; and a fact which the history of antiquity might well have taught, and which ancient precept had abundantly inculcated,<sup>1</sup> is even now being learned over again by bitter experience—the fact, I mean, that the unfettered activity of all is rendered possible only by the recognition of the natural distribution of gifts and powers. Nor did theology differ in this respect from secular science. Luther discovered no new highway to truth. His appeal

<sup>1</sup> Livy, i. cap. xlii. § 4.

was not from dogmatism to reason—for all revealed religion must be dogmatic, and reason is its only possible interpreter. But he appealed from the dogma of the Church to the dogma of Scripture, and from the reason of churchmen to the reason of all men. The barrier between the Church and the laity was removed. The Bible was thrown open to all. All were called to read; and if the layman read deeper than the churchman, his reading was not, professedly at least, rejected by the Church. God was thus called upon, as it were, to select His own interpreters. But even those who were thus consecrated were rarely set aside to the work. When the monasteries were destroyed, and the vast provision which our ancestors had made for the support of the spiritual life of the community was in a great measure diverted to other purposes, the only order in the Church which may be said to have been retained, and even reinforced, was that of Predicant Friars. But the activity of the preaching clergy in disseminating knowledge almost excluded them from its cultivation. Out of the Universities, the pursuit of theological truth was everybody's business alike, and what is everybody's business is nobody's business. The loss of the common language of the learned, moreover, was very inadequately compensated by translations, so that even in the countries which adopted the doctrines of the Reformation in common, the theological teaching of the Churches had to rely mainly on national resources. The doctrine of our universal priesthood was a bold and emphatic proclamation of the divine element in humanity. But from the other causes which I have mentioned, there is reason to doubt whether the Church of the



Reformation, as a whole, has maintained the position which naturally belongs to what is the spiritualizing institution, *par excellence*, in all well-ordered communities. At the very outset, in asserting the opposition between faith and works, it exhibited a tendency to forget the fundamental identity of grace and nature. But, begotten of opposition, this tendency disappeared with the occasion which had called it forth, and the minds of men, such as Luther and Melancthon, were ultimately reconciled to the philosophy which for a time they had repudiated.<sup>1</sup> With such partial and temporary exceptions, ultimate accordance between the dicta of nature and those of revelation have either been taken for granted, or stoutly asserted when called in question, from the days of Wickliff<sup>2</sup> downwards, by all but the narrowest sects. A scientific basis for ethics and jurisprudence has thus been maintained by the better class of theologians, of whom the so-called "Cambridge Platonists"<sup>3</sup> are the most conspicuous examples in this country. Of course, it is impossible to deny that clerical teaching has too often been confined within the limits which each particular sect assigned to "the Word," and Protestant has merely changed places with Catholic dogma. That it has failed to occupy, with greater security, a position

<sup>1</sup> Melancthon was the author of several treatises on ethics, and not only asserted the indispensability of philosophy as an auxiliary to theology, but recommended especially that of Aristotle, without confining his praise to his logic; whilst, in the sphere of practical activity, Bunsen has stated, as the fourth of the five propositions in which the Reformer sums up the distinctive characteristics of Protestantism, that "there is no difference between spiritual or religious acts (so called 'good works') and secular acts."—Vol. iii. p. 200.

<sup>2</sup> Neander, vol. ix. p. 238.

<sup>3</sup> See *Rational Theology in England in the Seventeenth Century*, by Principal Tulloch.

which is essentially untenable, is proved by the prevalence of exaggerated naturalism in most of the modern schools of secular thought. The "casting vote"<sup>1</sup> has been given to reason, where no casting vote ought to have been called for; and a heathen character has thus been imparted to secular science, from which it must be our effort to deliver it, without permitting its free development to be fettered by any final dogma whatever, either theological or philosophical.

## CHAPTER V.

### HUMAN NATURE REVEALS ITS OWN IMPOTENCE.

From the earnestness with which, in last chapter, I insisted on the fundamental identity of heathen and Christian anthropological beliefs, the reader may possibly be disposed to ask me why it was, if the theory of antique life was not at fault, that the practical life of antiquity, which was, or ought to have been, a realization of that theory, broke down. My reply shall be comprised in a single sentence—The want was not the want of knowledge, but the want of faith—*i. e.*, confidence that God by His grace, or special presence in our nature, will aid us to realize His law<sup>2</sup>—and of the strength<sup>3</sup> "to remove mountains" which faith

<sup>1</sup> Tenneman, 282.

<sup>2</sup> As to the distinction between Grace and Nature, see Kant, *Religion*, p. 259.

<sup>3</sup> It is in the failure of this strength, or power to realize the law which nature

communicates. The law was not unknown, but it was "weak through the flesh;"<sup>1</sup> and thus the presence of the Divine was recognized rather than realized.

"One is the race of gods and men,  
And from one mother are we both descended:  
But for the power—there the main difference lies."<sup>2</sup>

Apart from the doctrine of faith as the source of power, we have difficulty in pointing to a doctrine that is exclusively and exceptionally Christian.<sup>3</sup> And yet that doctrine, or rather the fact of which the doctrine is the recognition, did not originate with Christianity; but, on the contrary, as has been grandly said, faith "is an eternal reality, an actual existence in the spiritual world, as real as the physical forces revealed by Galileo or Newton; and which we have natural faculties capable of discerning, *when revealed to us*, in the same way as we have faculties capable of apprehending physical realities."<sup>4</sup> We can recognize its *necessity* when found, but we could not find it; and it is in revealing it

reveals, that we find the warrant for the jural recognition of the abnormal relations of war, neutrality, &c. Of this matter I shall treat fully in the *Institutes of the Law of Nations*, which I hope soon to publish as a sequel to the present work, and the introduction to which has already appeared in French under the title of *Prolégomènes d'un Système Raisoné de Droit International*, *Revue de Droit International*, livr. III., 1878.

<sup>1</sup> Matt. xvii. 20; 1 Cor. xiii. 2; Rom. viii. 3. Augustin, *Retractationes*, i. i. This point has been excellently brought out by Professor Seeley, *Ecce Homo*, pp. 90, 175, 179, &c.

<sup>2</sup> Cary's *Pindar Nem.*, vi.

<sup>3</sup> "What is now called the Christian religion," says St Augustin, "has existed among the ancients, and was not absent from the beginning of the human race, until Christ came in the flesh, from which time true religion, which existed already, began to be called Christian."—*Ut sup.*, i. 13. Max Müller's *Chips*, pref. xi.

<sup>4</sup> Erskine's *Spiritual Order*, p. 92.

that Christianity, of which it is the centre, differs from heathenism. It is in this sense, I think, rather than as "lighting another candle of the Lord,"<sup>1</sup> that we must take the saying "ubi desinit natura, ibi incipit gratia."

The imperfection of man's actual life was as well known, and almost as deeply deplored in the heathen as in the Christian world. The freedom of the will, and consequent voluntary character of transgression, the justice of God, and the inseparable relation between guilt and misery, were all clearly recognized and freely acknowledged. Confession is an exercise which has been familiar to the pious of all ages; and supplication, as has often been pointed out, has always been the special characteristic of humanity. "Seul entre tous les êtres ici-bas l'homme prie."<sup>2</sup> Both confession and prayer constitute important elements in the religious literature which the later Stoics have transmitted to us, and oriental literature is full of them.<sup>3</sup> Even the error of trusting to

<sup>1</sup> Culverwell, p. 224.

<sup>2</sup> Guizot, *L'Eglise et la Société Chrétiennes*, p. 22.

<sup>3</sup> By those who desire to give prominence to the exceptional character of Christianity, as well as by those who dispute the intuitive recognition of the Divine, this point is often disputed in the case of Confucius, on what appears to me to be very slender grounds. The most instructive passage I have been able to find is in the eighth book of the *Confucian Analects*, Legge, vol. i. p. 70, cap. xxiv. "The Master being very sick, Tsze-loo asked leave to pray for him. He said, 'May such a thing be done?' Tsze-loo replied, 'It may.' In the prayers, it is said, 'prayer has been made to the spirits of the upper and lower worlds.' The Master said, 'My praying has been for a long time.'" On this Dr Legge has a note with the very doubtful heading, "Confucius declines to be prayed for," in which he says, "Tsze-loo must have been referring to some well-known collection of prayers. Choo-He says, 'prayer is the expression of repentance and promise of amendment, to supplicate the help of the spirits. If there may not be those things, then there is no need for praying. In the case of the Sage, he had committed no errors, and admitted of no amendment. In all his conduct he had been in harmony with the spiritual intelligences, and therefore he said, *My pray-*

wisdom,<sup>1</sup> of believing in the perfectibility of humanity, and in the possible realization of the human ideal by human effort, with which the Stoics were so deeply chargeable, was an aberration from the central creed of our race; for to the extent not only of recognizing the need, but of cherishing the hope of aid from above, there can be no question of the accuracy of Tertullian's assertion that the soul is naturally Christian.<sup>2</sup> All of us, I am sure, remember Horace's charming ode<sup>3</sup> to a country maiden, beginning—

“ Cælo supinas si tuleris manus,  
Nascente Lunâ, rustica Phidyle; ”

and to some of us M. Guizot's remark will occur—“ C'est sur une foi naturelle au surnaturel, sur un instinct inné du surnaturel, que toute religion se fonde.”<sup>4</sup>

“ As under the (Mosaic) law,” says Neander, “ man's sense of its insufficiency to work out his justification was accompanied by the promise of One who should accomplish what the law could never do, so, in the progress of the pagan mind under the law of nature, there arose a sense of the

*ing has been for a long time.* We may demur,” adds Dr Legge, “ to some of these expressions, but the declining to be prayed for, and concluding remark, do indicate the satisfaction of Confucius with himself. Here, as in other places, we wish our information about him were not so stinted and fragmentary.” To me these expressions seem rather to indicate that Confucius prayed habitually, and regarded his being prayed for by another, on an exceptional occasion, as superfluous. Even if they should go the length of indicating his disapproval of prayers for health, it is by no means clear that his disapproval would have extended to prayers for grace or for the guidance of the spirits along “ the Path,” whether in health or in sickness.

<sup>1</sup> Kant's *Theory of Religion*—Semple's translation, p. 68.

<sup>2</sup> *Apologet.*, c. 17. Neander, vol. i. p. 246.

<sup>3</sup> Lib. iii. car. 23.

<sup>4</sup> Guizot, *ut sup.*, p. 20.



necessity of a new revelation from heaven, and a longing desire for a higher order of things. The notion of a Messiah, carried about by the Jews in their intercourse with different nations, everywhere found a point of contact with the religious sense of men, and thus natural and revealed religion worked into each other, as well as separately, in preparing the way for the appearance of Christ.”<sup>1</sup>

Scarcely in accordance with this, which is Neander’s prevailing view, is the passage<sup>2</sup> in which he seeks to confine the idea of Christian humility to the Platonic system, on the ground that the word *ταπεινός*,<sup>3</sup> generally used in a bad sense, is to be met with in Plato and the Platonists as the designation of a pious, virtuous temper; or that<sup>4</sup> in which he attacks Thomas Aquinas for adopting Aristotle’s doctrine of the *μεγαλοψυχία*, which Neander declares to “belong wholly to heathen morality, and to be necessarily connected with the ethical self-sufficiency, the self-feeling of antiquity.”<sup>5</sup> Now, so far from being peculiar to Platonism, I believe there

<sup>1</sup> Neander’s *Life of Christ*, p. 28.

<sup>2</sup> Vol. p. i. 26.

<sup>3</sup> *ταπεινότης* = *μικροψυχία*, *Arist. Rhet.*, 2, 6, 10. Socrates is said to have used it in a good sense.

<sup>4</sup> Vol. viii. p. 242.

<sup>5</sup> A clerical friend has kindly furnished me with the following valuable remarks: “There is a *right* self-assertion which is nowise contrary to sound morality or to Christianity. St Paul is humble in his religious attitude towards God and man; but his humility does not stand in the way of a most decided self-assertion in the presence of Agrippa, of Felix, and above all, towards the magistrates of Philippi, who had dared to wrong a Roman citizen. and then wanted to hush up the matter without apology (Acts xvi. 37; cf. 2 Cor. x. 8). And perhaps those are right who see a kind of self-assertion in the dignified refusal of Christ to plead before a court unable to appreciate His position and claims (Matt. xxvii. 14).” See also Matth. v. 16, and Sir A. Grant’s excellent note on *Aristot. Ethics*, iv. iii. 35-37, vol. ii. p. 78.

is no system whatever, either of ethics or religion, which ever obtained general acceptance with mankind, in which the so-called Christian principle of humility does not appear. We know, at any rate, that in Buddhism, the most prevalent of them all, it holds a prominent place, and that it was strikingly exhibited in the personal character of Confucius, and strongly insisted on in his teaching.<sup>1</sup> I confess to you, then, that I agree with Thomas Aquinas in thinking that the genuine and normal opinion of antiquity, whether as exhibited in the doctrine referred to, or in the central doctrine of the Socratic ethics, did not exclude the idea of Christian humility or any other Christian doctrine whatever.

And if subjective observation does not fail to tell us the unwelcome truth of our own imperfections, objective observation is still more outspoken with reference to the imperfections of our neighbours. No two men's faults of character are exactly alike; and each is always fully alive to the existence, in the other, of the faults which he does not share. Even the faults which we have in common with others, if we see them at all, are magnified to us when reflected on an objective canvas. On the other hand, however, there is nothing which has so great a tendency to conceal our own shortcomings from us altogether as finding that they are shared by vast masses around us. In such circumstances we cannot see the wood for the trees; and it is for this reason that the members of great states or great communities are always less cosmopolitan than the members of smaller ones, the stage of individual culture being the same. A French-

<sup>1</sup> Legge's *Chinese Classics*, vol. i. p. 95, prolegomena.

man, for example, is a far more prejudiced being than a Swiss or a Belgian; and there is no Englishman who is so insensible to the defects of his own country, or to the merits of any other, as an Englishman who has been educated at a great English public school, and who lives in London. We have only to look into a London newspaper in order to be convinced that to such a person, not only Paris or Berlin or St Petersburg, but even Edinburgh, is bewildering and often quite unintelligible. Everything elsewhere that differs from what he has been accustomed to in London appears to him absurd; every opinion that is new to him he declares to be wrong; and thus, in later life at any rate, even travel is of no use to him. But if his cosmopolitan vision be narrow, his metropolitan vision is wide, and it does not follow that the faults which he sees elsewhere are not often real faults. At all events there can be no doubt that he believes them to be so, and that the view which he takes of the wisdom or virtue of humanity, as a whole, is not an exaggerated one.

Abstractly, doctrinally considered, then, there is no reason to impugn the completeness of nature's teaching. There is no gap in the premises which consciousness and external observation place within the reach of reason. A man like Cicero might, logically, have developed a rule of human relations identical with that of Christianity, and he did, in fact, come very close on such a rule, whatever may be said of the manner in which he observed it.<sup>1</sup>

But the light which nature sheds on the phenomena of the will, though not deceptive, is flickering and intermittent; and

<sup>1</sup> See Froude's *Cæsar*—*passim*.

either the fact of its freedom, or the fact of its feebleness, almost always vanishes from the sphere of mere human vision. The former has been the error of most Asiatics, whose tendency is to lapse into fatalism. The latter was that of the energetic and self-confident nations of classical antiquity. The Stoics, it is true, were the Pharisees of natural religion, as Josephus, who was himself a Pharisee, said of them. But as the Pharisees were exaggerated rather than exceptional Jews, so the Stoics were exaggerated rather than exceptional Gentiles. The pride which peeped through the holes in the mantle of Antisthenes was the besetting sin of antiquity as a whole. The belief that, being *αυτόνομος*, man must also be *αντάρκης*, rested on a partial reception of the teaching of consciousness, and a consequent failure to recognize the contradictory principles which, however mysterious their union may be, consciousness does unquestionably reveal. Such a violation of the law of integrity will be more or less exhibited in proportion to the extent to which men have departed from or adhered to the central creed of the race. The notion of *αντάρχεια* (self-sufficiency), so prominent in Aristotle, is less conspicuous in Plato; and in the teaching of their great master it probably appeared in a still more qualified shape. But it corresponds to the fallen side of humanity. No system of mere human ethics has ever proved an adequate safeguard against it, which did not speedily degenerate into the opposite error. Even if Stoics and Epicureans had never rent humanity in twain, there is no reason to believe that Socraticism would have succeeded in preserving the balance between the deification of the will which dishonours God, and

the fatalistic distrust of it which dishonours His creature. Even within the pale of the Christian Church one or other of these tendencies has been at the root of almost every heresy that has arisen; and it may now, I think, be laid down as a dictum of experience, that they represent the two directions in which the anthropology of unaided reason tends to conflict with that of revelation, and in so doing, to diverge from the actual teaching of nature. In asserting that "man is a law unto himself," and even in enunciating that law, the revelation through nature and the revelation to nature are at one; but it is the latter alone which consistently couples this fact with the asseveration that "strength belongeth unto God."<sup>1</sup> It was only by the reunion of the human to the divine, by means of the incarnation of Christ, and the continued communication of His grace, that humanity could be potentiated to receive the law which it had never ceased to proclaim.

But here it is, too, that anthropology passes into theology; that ethics and jurisprudence, sensible of their own insufficiency, take refuge in religion; and that academic students and teachers touch the boundary line which divides the Faculty of Law from the Faculty of Divinity.

<sup>1</sup> Ps. lxii. 11.



## CHAPTER VI.

## HOW MAN BECOMES COGNIZANT OF THE RULE OF LIFE.

Having seen reason to conclude that, even in the absence of supernatural revelation, mankind acknowledges, and always has acknowledged, the presence of an internal rule of life, our next investigation must have reference to the manner in which he becomes cognizant of this rule.

(a) *The rule of life is prescribed by our whole nature, and consequently, in accepting the maxim, "follow nature," we employ the word nature, not in a higher and different, but in a "wholer," more complete, and more perfect sense than is popularly attached to it.*

The second of the three rules which Sir William Hamilton has given us<sup>1</sup> for verifying the apparent dicta of our nature—viz., that "the whole facts of consciousness must be taken without reserve or hesitation"—is that of which the forgetfulness has perhaps most gravely invalidated both the theories and the practice of men.<sup>2</sup> As regards the matter in hand, at all events, you will find that the distinction between what is true or false in anthropology turns, almost invariably, on whether or not this "law of integrity" has been obeyed.

<sup>1</sup> *Metaphysics*, vol. i. p. 268.

<sup>2</sup> It has always appeared to me that one of the most useful directions in which concrete logic could be prosecuted would be in the construction of a science of aberrations. Aristotle has laid the foundation of this, as of so many other inquiries, in his doctrines of the *παρεκβάσεις*.—*Politic.*, lib. iv. c. ii.

On such a subject total error is scarcely possible for any one who retains the instincts of a man, and accordingly, there is no anthropological system of any importance which does not rest on a modicum of truth. But, on the other hand, from the extent to which opinion is influenced by temperament and genius, both national and individual, there is no subject on which exaggeration and consequent one-sidedness have been so conspicuously exhibited. It was by failing to accept the teaching of nature in her integrity that the Cynics and the Stoics<sup>1</sup> fell away from the Socratic ethics in the one direction, and the Cyrenaics and Epicureans in the other, till the one sect almost forgot that they had bodies, and the other that they had souls. Their respective merits, it is true, were very different, for the one obeyed an elevating and saving, and the other a degrading and destroying tendency. But their errors, if not equally perilous in their practical, were equally extravagant in their theoretical results; for whilst Epicureanism, like modern Sensationalism, ended in denying the existence of any absolute criterion of conduct, and thus proclaiming the impossibility of ethics altogether, Stoicism ended in a rule of life, the realization of which was impossible, and which, if realized, would have been fitter for Prometheus on the rock, or Milton's Satan, than for beings whom God had created to obey in order that they might enjoy. The phenomenon which these divergent sects exhibited, in a manner so prominent as to render them the typical instances of it to other ages, is one which history has repeated in endless phases, and which our own life is continually reproducing. In heathen times it

<sup>1</sup> *Ante*, cap. iv.

was only when so wonderfully complete a manifestation of humanity as Socrates appeared, that men were recalled for a time to a sense of the harmonious character of nature as a whole, and that a stride was made *directly* upwards, which crowded more history into a single life than many ordinary generations exhibit. Under Christian influences, progress, on the whole, has been less intermittent, because, apart altogether from its supernatural action on the will, one of the effects of Christianity has been to keep the harmonious character of nature, and, as a consequence, the organic character of society, more steadily before the eyes of men. It is in its sanity rather than its novelty that the ethical teaching of Christianity surpasses that of the Socratic School. But Christianity itself is one thing, and Christianity as interpreted by human teachers is quite another thing; and we have had many anthropological doctrines in Christian times which were not Christian.

*(b) Conscience is not a separate faculty; but the phase in which our whole normal nature appears, when manifesting itself ethically. It may be briefly defined as moral-consciousness.*

The most recent example of the class of errors which springs out of a violation of the law of integrity<sup>1</sup> consists in representing our knowledge of right and wrong as imparted to us by an exceptional organ, which is so far from being in harmony with our other faculties and senses, that its very object is to condemn the impulses of our general nature. As Scotland is still,<sup>2</sup> probably, the headquarters of this ethical

<sup>1</sup> Hamilton, *Metaph.*, vol. i. p. 268.

<sup>2</sup> I am glad to know that the doctrine of conscience is not taught, in this sense, by the present learned occupant of the Chair of Moral Philosophy in Edinburgh. I hope it now rarely finds utterance in the pulpit. If the harmony of the

heresy which she contributed largely to originate, it seems desirable that we should consider it in somewhat greater detail than is consistent with the general scheme of this work. It is generally supposed that the device of thus accounting for our moral emotions belongs altogether to modern times, and the discovery of the "moral sense" is ascribed to Lord Shaftesbury, whilst our own Hutcheson<sup>1</sup> gets credit for having developed the theory of its action. But this statement, though true in the main, is not altogether true. I do not attach much importance to the fact pointed out by Professor Trendelenburg,<sup>2</sup> that the word conscience (*conscientia*, *συνείδησις*), even when taken to indicate the ethical information which our nature conveys to us with reference to itself—what we may call its ethical self-revelation—is not to be found in Greek philosophy before the time of the Stoics, and scarcely anywhere in Scripture except in the Epistles of St Paul. That fact, as it seems to me, amounts merely to this, that the language of philosophy, and language itself through philosophy, were enriched as time went on, and as thinking

teaching of conscience with the fundamental impulses of our nature be admitted, the question whether it be or be not a *separate* faculty may, for practical purposes, be relegated to the sphere of ethical psychology. It needlessly complicates our conception of our moral nature, but does not exclude natural law. The assumption of such a faculty is a sin against "the law of parsimony," rather than against the law of integrity, though the statement of its necessity gives to it something of this latter character also. If the other faculties and impulses of our nature are in need of it, they cannot be fundamentally sound. Its assumption is still a libel on nature in general.—Calderwood, p. 78.

<sup>1</sup> Hutcheson, Reid, and Stewart held the same opinion with reference to intellectual as to moral consciousness; and the whole of the discussion in Lectures XI. and XII. of Hamilton's *Metaphysics* (vol. i. p. 182 *et seq.*) is applicable to the subject of this chapter.

<sup>2</sup> *Naturrecht*, p. 53.

became more definite and precise. It does not indicate any change of opinion with reference either to human nature or the methods of its revelation, and this indeed is very much Professor Trendelenburg's own view.<sup>1</sup> But it is important to remark that the sense attached to the word, when it did come into technical use, whether by the later representatives of the Socratic school of ethics, or by the orthodox Christian Church, was not that of a separate faculty, still less of a sense, resembling, in any degree however remote, our physical senses. Conscience, as they understood it, was not a part of our nature sitting in judgment on the rest of our nature, and condemning it; but the phase in which our whole, and as such, our normal nature appears when manifesting itself ethically.

The common statement then is correct, in so far as it affirms, merely, that Lord Shaftesbury's theory had not been anticipated by St Paul and the Stoics, nor yet by such writers as Cicero,<sup>2</sup> who uses the word "conscience" in the sense which has always been attached to it in popular speech—the sense, viz., of ethical reflection—a sense to which Bishop Butler adhered, and which is far more in accordance with the ancient theory than with the modern one. But the moralists of the eighteenth century had a predecessor of another class whom they would have been

<sup>1</sup> *Abhandlungen*, vol. iii. p. 199.

<sup>2</sup> *E.g.*, "Conscientiâ convictus, repente conticuit" (*In Cat.* 3, 5); "magna vis est conscientiæ" (*pro Mil.* 23, 61), &c. Professor Blackie has pointed out that *συνείδησις*, as a popular word, is "as old as Periander and Bias."—*Four Phases of Morals*, p. 366. As to the period of its introduction into philosophy, see Hamilton's *Metaph.*, vol. i. p. 197.



less willing to acknowledge. The existence of an exceptional moral faculty, or moral sense, was a doctrine of our countryman, if such he was, the heretic Pelagius, in the fifth century—a doctrine which he opposed to the orthodox teaching of the Church as represented by Augustin. In obedience to this hypothesis, Pelagius denied not only the Socratic doctrine of the fundamental rectitude of humanity, which the Church held, but the especially, though not exceptionally, Christian doctrine of the Fall; for it was unnecessary to assume that a nature had fallen which was originally imperfect. It is an instructive instance of the manner in which every error involves all error, as every truth involves all truth, that a denial of the original rectitude of humanity should, by leading to the denial of sin, have developed itself into a theory of the perfectibility of human nature by its own efforts, and thence to the denial of the necessity of divine grace! Yet such appears to have been the outcome of Pelagius's speculations, and still more explicitly of those of his friend and disciple Coelestius.<sup>1</sup> With this curious glimpse into the experience of the fifth century to guide us, let us see how the doctrine of the moral sense originated, and what have been the consequences that have resulted to our own and other branches of science from its adoption, in our own age.

In Shaftesbury's mind it arose as a protest against the moral scepticism which had resulted from Locke's rejection of the theory of innate ideas. If sensation and reflection on sensible phenomena were the only sources of our knowledge,

<sup>1</sup> Neander, vol. iv. pp. 229, 309.

the existence of a moral sense, or organ of direct moral cognition, seemed necessary to enable our nature to prescribe rules for its guidance. The merit of the hypothesis consisted in placing in an intelligible light, not necessarily inconsistent either with the metaphysics or theology of the time, the assertion that man could distinguish right from wrong, without denying the sinfulness of his human nature, which its authors conceived themselves bound to admit. They revolted from the moral scepticism of the age, but they were not bold enough to break loose from the narrow and erroneous interpretation of Christianity out of which, in conjunction with the metaphysics of Locke, this scepticism had sprung. Their theological guides dwelt on the too obvious fact that the heart of man is "deceitful above all things, and desperately wicked,"<sup>1</sup> and applied the dictum to the original and fundamental conception of humanity: their philosophical guides assured them, not without reason, that if this was so, man *as man* could not distinguish right from wrong, and that natural ethics and jurisprudence, in any other sense than mere empiricism, were impossible. They were resolved to escape the conclusion, but they feared to touch either of the propositions on which it rested; and they attempted to evade the dilemma in which they found themselves by the assumption of a natural faculty opposed to nature. But the remedy was still an ineffectual one; for, as their opponents were not slow to urge, the moral sense was still but a part of a nature fundamentally corrupt; and if the fact of its approval or disapproval was the criterion of right and wrong, moral distinc-

<sup>1</sup> Jer. xvii. 9.

tions, if not arbitrary, were relative to the individual, and there was still no absolute rule of life. In order to escape from this consequence, it was necessary that conscience should be made, not a legislator, but a judge—not a lawgiver, but an interpreter of an absolute objective law; and accordingly it was declared to be the voice, not of humanity either normal or abnormal—not God's voice in nature—but God's commands to nature,—each separate dictum thus becoming a direct revelation. By this means the absolute character of moral distinctions was saved; but it was saved at the expense of presenting a wholly erroneous conception not only of human nature, but of the Divine nature itself. For whose work, in this case, was our general nature, and whose voice spoke in its normal impulse? Was God's voice raised only to condemn His own work, or was the whole nature of man, with the single exception of one alien faculty by which it was judged and condemned, the work of the devil? Here surely was dualism or Manichæism, at the very least of it. When stated thus broadly, it is plain enough that such a conception of humanity is at variance with all religion, both natural and revealed, and conflicts most flagrantly with our daily experience of God's nature and government; and yet it is grievous to think that we should, all of us, have heard it preached so often.

Then how was the moral progress, or retrogression, which was visible both in individuals and in communities, to be accounted for, and what has always been one of the strongest arguments of utilitarianism to be met, if the presence of such an infallible oracle was inseparable from the possession of a

human soul? No advance in intelligence could render more audible a voice which all must hear, or make clearer commands which none could misunderstand. Knowledge and virtue were thus dissevered, and the study of nature, in any other direction than physics, even if possible, was needless. In order to know his duty, man had only to listen, and the "reverential study of social and political science," which, we are told, the Buddhists regard as "the highest religious duty,"<sup>1</sup> was henceforth to be abandoned by Christian nations. The Empirics were thus left in undisputed possession of the field of science by those who professed to be their stoutest opponents. It is true that those who reject the theory of a special moral faculty do not always refrain from laying upon consciousness, as a whole, the unnecessary burden of revealing a ready-made moral law. Kant was no believer in "an innate sense or guardian nature which whispers into our ear,"<sup>2</sup> and yet he held the moral law, as such, in its completed form, to be revealed to us as a practical law *à priori*. "If the question be put, . . . how do we arrive at the consciousness of the moral law? The answer is the same as in the case of any other proposition *à priori*, that we are conscious of a practical law *à priori*, as we are conscious of theoretical ones, by attending to the necessity with which reason obtrudes them on the mind."<sup>3</sup> Again, "our consciousness of this fundamental law is an ultimate fact of reason, for it issues from no preceding data—*e.g.*, the con-

<sup>1</sup> Alabaster, *The Wheel of the Law*, p. 22.

<sup>2</sup> Semple's trans. of the *Metaph. of Ethics*, p. 41. See also pp. 39, 92, 112, &c.

<sup>3</sup> *Ib.*, p. 101.

sciousness of freedom—but is thrust upon the mind directly, as a synthetic *à priori* proposition, and is bottomed on no intuition whatever, whether *à priori* or *à posteriori*. . . . When it is said that this law is given, I beg it may be understood that it is not known by observation and experience, but that it is the single isolated fact of practical reason, announcing itself as originally legislative—*sic volo, sic jubeo*.”<sup>1</sup> Kant’s objection to utility, as the test of morality, is the well-founded one that it requires extended experience and acquaintance with the world, and thus assumes the knowledge which it professes to communicate. Now, the very same objection, as it seems to me, applies to the assumption of a ready-made moral law. The law which Kant asserts to be thus revealed, as you are no doubt aware, is his famous “categorical imperative,” or fundamental moral law of reason: “So act that thy maxims of will might become law in a system of universal moral legislation.”<sup>2</sup> I cannot but think that this law contains a great deal not only of reason, but of reasoning and observation, that it is far too complicated a matter for consciousness to reveal by any single act, and, with all due deference for so great an authority, that, in enunciating it, Kant sinned against Sir William Hamilton’s “law of parsimony” as egregiously as the Scottish moralists in general have sinned against his “law of integrity.” How, for example, is any one to know, with reference to a particular act, that it is “fit for law universal,” any more than that it is useful or expedient? Is not the question at issue this very “law universal,” the knowledge of which Kant does

<sup>1</sup> Semple’s translation of the *Metaph. of Ethics*, p. 103.

<sup>2</sup> *Ib.*, p. 102.



not explain, but gratuitously, needlessly, assumes, just as the utilitarian assumes our knowledge of what is expedient or useful? The difficulty is always with the "what." When I am told to "follow what is *useful*," I have still to ask "what *is* useful?" When I am told to follow "what is *according to law universal*," I must ask "what *is* according to law universal?" But "conscience" and "nature" are both measures of the "what;" and all I contend for is, that nature as a whole is a better measure than conscience, which is only a part of nature.

The only hypothesis, then, which appears to explain our knowledge of the absolute law, without running us into anthropological dualism, appears to be that which identifies conscience with the dicta of our general and normal nature as a whole, as opposed to our special and exceptional nature, and which looks for the moral law, the rule of life, as a gradual manifestation and recognition of this nature, to and by itself.

The manifestation, I say, will be gradual, as well as the recognition; by which I mean that what is actually manifested to the individual will become more definite in its outline at every stage of our increasing moral stature; for the more perfect the man is, the more perfect will be the type of humanity which he manifests to himself, and the consequent test of the quality of actions with which his nature supplies him.<sup>1</sup> It is the ultimate object of the manifestation, the ideal in which the human meets the divine, which alone is unchangeable. Humanity, like the burning

<sup>1</sup> As to the study of savages, *vide ante*, p. 67.

bush, is always divinely illuminated, but it becomes more capable of gazing on the ineffable light that is within it as its moral eyesight strengthens. It is in this strengthening of the moral eyesight that the development of conscience, or, as I prefer to say, ethical progress, consists. The law that is within a savage is the self-same law that is within a civilized man, otherwise the savage would not be a man; but the savage does not know—is not *conscious* of the law to the same extent. Such I believe to be the ethical creed at which most men who are capable of forming one at all are arriving; and it is highly noteworthy that the moral consciousness of the modern world, in this as in so many other instances, seems fast tending to identify itself with what was, at bottom, the prevailing consciousness of humanity, even in heathen times. In order that you may see how complete this identification in some cases has become, let me first refer you to a passage in Trendelenburg's *Natural Law*,<sup>1</sup> in which he has stated the characteristics and functions of conscience as he understands them. "The appetites and desires, confined and limited, are separate and particular sides of human nature, of the human being regarded as a whole; and an evil conscience consists in the reflex action of the whole man against a part which has attempted to assert an undivided supremacy—an action which exhibits itself in the form of remonstrances, accompanied with certain painful and pleasurable emotions. The phenomenon of a good conscience is still more readily intelligible. It is the assent of the whole man to the action of a part which has remained in harmony with

<sup>1</sup> *Naturrecht*, p. 56 *et seq.*

his general nature. What is called a warning conscience still rests on the same ground. It consists in remonstrances which, arising out of the whole man, forbid the promptings of the self-asserting part before they have vindicated their supremacy by action. In this view conscience consists in the action and retro-action of the whole man against the parts, by means of remonstrances with their attendant feelings, and as such the conscience is the power which ratifies the decrees of the will. Moreover, as the whole man is founded in the idea of humanity, and this idea originates with God, the feelings of conscience necessarily remount, in their own proper train, to the relation with the divine. In this sense conscience is the voice of God within us, which, deeply seated in the recesses of our nature, and uncorrupted, seeks honour from God and not from man. In conscience man rests upon himself and his God. It is he who thinks, it is he who feels; but what he thinks, and what he feels, he thinks not as the dictate of his discretion, he feels not as his liking, but as what, for the will, is a matter of necessity. It is for this reason that man perceives in conscience the deepest unity of his nature, and that where conscience is not recognized he becomes a mere machine." "Language," he continues, "has striking pictures by which to characterize those acts of self-judgment which terminate in profound emotions. She speaks of the conscience being stunned and benumbed; thereby indicating that condition in which either the old desires and passions, or some new-born desire or passion, has so absorbed the whole man as to prevent any association of ideas from an opposite

point, any thought which represents the whole man from coming to light, or from gaining the ascendancy. A sleeping conscience, again, is opposed to a waking conscience, the former exhibiting very nearly the phenomena just described, whereas the latter indicates the condition in which, after peace has been established, either the whole man, or another side of the man from that which dominated him before, comes into action, and vindicates the ascendancy of his better impulses."

In the sentences which conclude this remarkable passage,<sup>1</sup> Professor Trendelenburg refers to a subject which I have just indicated, and which, more or less explicitly, will occupy us again and again. I mean the development of conscience, public and private. For the present I shall translate his words without comment, merely by way of breaking ground.

"When the rise of conscience is correctly stated," he says, "in its natural connection and mental origin, it becomes evident that it is no ready-made organ, with a definite and positive purport, but that it develops itself in the midst of the relations of life and the experiences of the individual. Though the idea of the whole man—the idea of humanity in the individual—which constitutes the last determining ground of conscience, is the same always and in all, it depends upon a number of subjective circumstances which are ever changing in the inner life of the individual to what extent the whole man is active through means of conscience. By directing our attention to the manner in which conscience

<sup>1</sup> Very sad that we shall have no more passages from that pen. *Ave, pia anima!* January 1872.

is developed, we become acquainted with the means by which it may be awakened and sharpened, rectified, deepened, called into action, and guarded, in order that it may become a clear and pure divine voice. Of itself it is exposed to individual distortion and deception. Pride and vanity, inseparable from the natural man, contribute largely to what is called a good conscience; and the fear of man is not unfrequently that which presents itself in the form of an evil conscience. The constraint and solicitation of the passions assume the character of ethical necessity and freedom. For these reasons the judgments which we form of our individual actions deserve the name of dicta of conscience only in so far as they arise from a frame of mind which is elevated above selfish considerations into the region of the good.”<sup>1</sup> In criticising this passage, Professor Calderwood says: “The ground is solid, but not sufficient. In two respects the insufficiency appears, ‘The whole man does not always resent the action of the self-seeking part’—*den selbstsüchtigen Theil*,—and what then? But more especially, we want an explanation of antagonism or acquiescence. And if we may progress in our feeling of resentment or approval, we need knowledge in order to determine the line in which progress shall be esteemed true moral culture.”<sup>2</sup> In answer to the first of these objections—“that the whole man does not always resent the action of the self-seeking part”—I ask if man is to be regarded only *at times* as a moral and responsible being? The contention of Professor Trendelenburg, in which I concur, of course is that the

<sup>1</sup> See, to the same effect, Krause, p. 38.

<sup>2</sup> *Handbook*, p. 79.



general nature *always* resents the rebellion of the part, though its resentment may be ineffectual,—why it should be so is another question, which would lead into a discussion of the nature of sin. Then, as to the second objection—that “we want an explanation of antagonism or acquiescence”—I reply that the antagonism or acquiescence of our general nature, as opposed to a part, is not more inexplicable, and is surely more authoritative, than the antagonism or acquiescence of a part, as opposed to our general nature.

The other expression of opinion to which I wish to call attention, though less developed, points clearly in the same direction. Sir Alexander Grant, in the second essay prefixed to his *Aristotle*, says: “The very word ‘conscience,’ on which right so much depends, is only another term to express ‘consciousness,’ and a man differs from a machine in this, that the one has a law in itself,—is moved, as Aristotle would say, *κατὰ λόγον*; the other is moved *μετὰ λόγον*, has the law both in and for himself.”<sup>1</sup> The use of the word “consciousness” in this passage, as identical with conscience, would alone seem decisive as to which side of the controversy Sir Alexander Grant had embraced, for “consciousness” surely is not a separate faculty.

My special reason for insisting that conscience is the revelation of our whole nature, and not of a special faculty, will be apparent to you when you come to see that it is this view of the indivisibility of our moral nature which warrants our repudiation of the distinction between perfect and imperfect

<sup>1</sup> Vol. i. p. 49.

obligations, and furnishes the foundation for the positive, or what has been called by its German expositors, the "harmonious" system of jurisprudence.<sup>1</sup> But in connection with the historical considerations recently submitted to you, it is important to remark that, in the fact that we appeal to our whole nature for the rule of life, we have the answer to the polemic,—not against the peculiarities of Stoicism indeed, which, when Stoicism is taken in its separate and special aspect, I regard as unanswerable,—but against the maxim "follow nature," itself, a polemic which Sir A. Grant—not very consistently, as it seems to me, with the passage I have just quoted to you—has extended to that maxim even in the form in which it was revived by Bishop Butler in his *Sermons on Human Nature*.

Sir Alexander Grant speaks disparagingly of Butler. "Into the difficulties of the question," he says, "Butler has not entered. For instance, while he is perfectly successful in establishing against the Hobbists the reality of the moral elements in man's nature, he does not tell us whether or not he would agree with the Stoics in ultimately giving the entire supremacy to a man's reason and conscience, so as to supplant the other instincts, or at what point he would stop." Had Sir Alexander Grant said that Bishop Butler does not explain all the phenomena presented by the action of the will; that he does not tell us why we do not always will to act in accordance with the fundamental principles of our nature; or why, when we do so will, or seem to ourselves to will, our willing meets with insuperable internal impediments; that he

<sup>1</sup> Ahrens, *passim*.

does not, in short, explain the nature and origin of voluntary transgression,—he would have pointed out the direction in which Butler's, like all other explanations, is inadequate. But as he puts the objection, Butler's answer, I imagine, would have been plain enough. He would have told him that he does not admit the antithesis between "the other instincts" and "reason and conscience;" that the supposition of the other instincts being ranged on one side, and reason and conscience on the other side, is a supposition not warranted by the phenomena which human nature presents, or which, on the principles of optimism—on the assumption of the rectitude of God Himself—any nature created by Him can present. Butler's view of the matter is substantially in accordance with that which I have above submitted. Though he often speaks of "conscience or reflection" as a special faculty, and assigns to it a pre-eminence over the other faculties, his whole argument is directed against the supposition that it is in conflict with all, or indeed with any of them, when normally manifested. He regards it rather as a certain harmony, balance, or proportion, which, in their normal condition, they tend to preserve amongst themselves, and the action of which we must conceive rather as the result of their joint activity than as a force opposed to or even alien from them.<sup>1</sup> That this harmony may be destroyed, Butler is, of course, very far from denying; but when such destruction takes place, he ascribes it, not to the action of our general nature against conscience as an opposing force, but—in exact accordance with the passages from Trendelenburg, and from Grant himself, to which I referred above

<sup>1</sup> Ser. ii. p. 19; ser. iii. p. 24—ed. 1839.

—to the action of one or more of the principles of which this nature is made up against the general principle which animates it all. The whole objection of Sir Alexander Grant, and of the very numerous class of reasoners who join with him, good old Samuel Johnson included, consists, I think, in their failure to recognize in nature the power of dictating to man anything else than the pursuit of immediate pleasure, or the escape from actual or visibly impending suffering. “Is the life of the saints and martyrs,” Sir Alexander asks, “to be called a life according to nature? If not, is it better or worse? and if better, is not man to aim at the better? . . . There is one mode of representation which describes life as a progress, a conflict, a good fight; another which makes it the following of nature. On the one hand, there is the spirit of aspiration and effort, the tendency to asceticism, the victory of the will; on the other hand, there are the genial, kindly human feelings, there is the wise passivity of mind, there is the breadth of sympathy which counterbalances an over-concentrated intensity of aim. To make the formula ‘Live according to nature’ of any value, we require to have these conflicting tendencies harmonized with each other.” I entirely concur with Sir Alexander Grant when he says that the whole question is one not of mere words, but implying the discussion of a very important subject—namely, the way in which life is to be conceived, and, I would add, in which jurisprudence is to be treated, not only as a science, but, in no small measure, as a practical art. Here, then, let me sum up what I conceive to be not only the Socratic, but the human, and as such the Christian, answer to the train of reasoning which Sir

Alexander Grant has pursued,—and an answer which, if I am not greatly mistaken, would have had the concurrence of Bishop Butler. “The spirit of aspiration and effort” is not opposed to the “genial, kindly human feelings,” nor to the “breadth of sympathy” of which he speaks. “The progress, the conflict, the good fight,” is an effort not by an external power to drive nature from her course, or even to control her activity, but by nature herself, as revealed to us internally and externally, to vindicate her supremacy over the denaturalizing influences, over the rebellious subjects within her own realm which oppose her free development and harmonious action. When the conflict is peculiarly hard; when the external principle of disorder has succeeded in ranging the animal and sensual against the rational and spiritual propensities; and when nature herself, as a whole, is in danger of being degraded from a human nature into something worse than a brute nature,—she calls—and in the case of saints and martyrs calls not in vain—for aid from above. But it is for aid, not for her destruction, but for her preservation and support; it is that she may become not less herself, but more herself, in this her hour of trial; and that, in her triumph, she may save, not the higher principles alone from degradation, but very often also the lower propensities, “the law in the members,”<sup>1</sup> from self-destruction by excess of present grati-

<sup>1</sup> “*Omnia illa ad quæ homo habet naturalem inclinationem,*” says Thomas Aquinas, “*ratio naturaliter apprehendit ut bona, et per consequens ut opere persequenda, et contraria eorum ut mala et vitanda.*” And again, “*Omnes hujusmodi inclinationes, quarumcumque partium naturæ humanæ (putà concupiscibilis et irascibilis), secundum quod regantur ratione, pertinent ad legem naturalem.*” —*Prim. Sec., quæst. xciv. art. 2.*



fication. The whole effort of the will, when directed to the realization of the higher life, is an effort not against nature, but in favour of nature,<sup>1</sup> in every sense that can be attached to that word except the single, and, even if true, surely very narrow sense of it in which it is taken to mean the tendency to the unbridled indulgence of one or more of our irrational appetites. "Man," says Kant, "is unholy enough, but the humanity inhabiting his person (his proper person) must be holy."<sup>2</sup>

## CHAPTER VII.

### OF THE RIGHTS AND DUTIES WHICH NATURE REVEALS.

We now enter on the third of the three branches into which, as I mentioned at the commencement of Chapter III.,<sup>3</sup> an inquiry into the law of nature, or a treatise on the principles of law, divides itself.

Having seen that the legislative character of our nature is guaranteed to us, both by the dicta of subjective consciousness and by the manifestations of objective consciousness in the history of opinion, and having further, to a certain extent, examined the manner in which this revelation takes place, we must now place ourselves in contact with objective existence, and inquire whether the nature which we are thus to obey

<sup>1</sup> Butler, *ut sup.*, ser. ii. p. 19.

<sup>2</sup> *Metaph. of Ethics*, p. 137, and *Theory of Religion*, p. 69, Semple's trans.

<sup>3</sup> *Ante*, p. 54.

reveals to us rights and duties as existing in ourselves and others, and if so, what is their character, and what are their relations and their limits?

1. *Nature reveals no rights in relation to the Creator.*

The necessary truth of this proposition has already, I trust, been sufficiently established.<sup>1</sup> It places us at once in a different relation to God from that in which we stand to all created existences. In asserting that it is the result of a cause external to itself and independent of its volition, and in joyfully accepting itself as it is, our nature negatives the conception of rights on the part of the creature, or duties on the part of the Creator.<sup>2</sup> The importance of this assertion in religion consists in differencing the relations of Creator and creature from those of creature and creature, not in degree, but in kind, and indicating the necessity of a different revelation.<sup>3</sup> Its moral importance consists in founding jurisprudence, not on primary rights, but on primary facts, by which all subsequent rights are measured, and their respective spheres, whether subjective or objective, are determined *ab extra*, and will become more and more apparent as we proceed. We shall find that it is this *de facto* origin which, by removing our human rights beyond the reach of human volition, communicates to them their divine character; and, moreover, which gives to positive law, as the rule determining these rights in the special instance, the declaratory character which clothes it also with a similar sanctity.

<sup>1</sup> Chap. iii. sec. 3, 4.

<sup>2</sup> *Ante*, p. 58.

<sup>3</sup> *Summa*, ii. ii., quæ. lvii. art. i. vol. viii. p. 417; and Semple's *Kant's Theory of Religion*, p. 203, n.

There is one sense, indeed, in which some have thought that rights exist in the creature in relation to the Creator—viz., that it is impossible, or at least unthinkable, that He should do them wrong.<sup>1</sup> But such an assertion plainly involves a vicious circle; for it assumes a criterion of right and wrong which is dependent on the character of the actions to which we seek to apply it. Unless we had a measure of virtue independent both of nature, which is God's work, and revelation, which is God's word, the two assertions—first, that God must do what is right; and second, that what God does is right, in so far as His creatures are concerned at all events—must be absolutely identical. For this reason I never could see the object of the controversy as to whether morality be dependent on God's will, or God's will dependent on morality.<sup>2</sup> Our conception of goodness, like all our conceptions, must rest on a postulate in the last instance—fatalism, in this sense, is inevitable—and if we assume a standard of morality anterior to or apart from God's will, we simply assume another god whose will it is. Nor is any real progress made by the modification of the theological doctrine originated by Leibnitz, who has been followed by Krause and Röder, and, I believe, by Professor Mansel, which seeks the origin of morals not in the will, but in the nature of God; for here the distinction is either merely verbal, or else it carries us into a region where consciousness is silent and knowledge impossible. If God's nature and His will be harmonious, we have merely substi-

<sup>1</sup> "Das Fromme ist nicht das Fromme weil die Götter es lieben; sondern die Götter lieben es, weil es das Fromme ist."

<sup>2</sup> Cudworth, preface, p. xxviii. *et passim*.

tuted one word for another: if they are discordant, the nature of a being so constituted is no better a measure of virtue than his will, and neither of them will furnish us with a basis of morality or a criterion of right and wrong.<sup>1</sup>

2. *Nature reveals to us duties in relation to the Creator.*

That notwithstanding the absence of all corresponding rights, we owe to God the religious duties of gratitude, adoration, obedience, and faith—or trust in His beneficence, even where it is not apparent to our understandings—has never been substantially questioned by sane men, however rude or corrupt.

But the feeling that God is absolutely independent of us, and that it is only in a figurative sense that we can talk of serving Him, has led many, even amongst ourselves, to infer that our secular duties have reference exclusively to our fellow-creatures—that it is to man and not to God that we owe them—and this erroneous conception of secular duty has led to two very unfortunate results.

1st, A cleft has been made between religion and morality, which has led to the notion that our devotion to one class of our duties must necessarily be in an inverse ratio, whereas in reality it is in a direct ratio, to our zeal and industry in the other. Not only in mediæval but in modern times, men

<sup>1</sup> See the opposite view stated by Shaftesbury (*Inquiry concerning Virtue*, vol. i. pt. iii.) and Leckie (vol. i. p. 55). “The theory,” says the latter, “which teaches that the arbitrary will of the Deity is the one rule of morals, and the anticipation of future rewards and punishments the one reason for conforming to it, consists of two parts—the first annihilates the goodness of God, the second the virtue of man.” The “two parts” appear to me to be entirely independent; and whilst the first proposition rests, I believe, on a logomachy, Mr Leckie’s dissent from the second has my warmest sympathy.

have become "slothful in business," in the belief that they "were thereby serving the Lord," and in extreme cases have arrived at the still more objectionable conclusion that it was possible to be pious without being honest.

2d, A line has been drawn between the subjective and objective sides of morality, by which the former has been robbed of the character of virtue.

From failing to regard our subjective duties, or duties to ourselves, as duties imposed on us by the constitution of our nature and the scheme of the universe, our subjective rights have come to be regarded as destitute of any other sanction than the reflected one which they derive from such duties to our neighbours as their performance may involve. If the rights which I assert, or the acts which I perform in my own behalf, can be shown to minister to the interests of another, to this extent they become not my rights but his. On my part they are duties which I owe to him, and their performance by me is admitted to possess the character of virtue which belongs to all acts of duty. But if, on the other hand, I alone am interested in them (and this isolation of self-interest though impossible as a fact, is the only hypothesis to which we are entitled, so long as we are dealing with the subjective side of morality exclusively), these rights, when viewed apart from the relation in which I stand to God, assume the character of assertions of my solitary being as opposed to being in general.

It is this train of thought which, if I am not mistaken, has led to the identification of virtue with benevolence by Hutcheson, and still gives vitality to a scheme of ethics amounting



to nothing short of a surrender to the opponents of absolute morality of the common ground on which not only subjective but objective duty ultimately rests.<sup>1</sup>

It is quite true that, from the necessary interdependence of subjective and objective interests, the whole of our subjective rights are in reality objective duties. In the sequel I hope to show that there is no right subsisting in any creature the assertion of which is not a duty owed by that creature to his fellow-creatures. But though the reality of our subjective rights thus admits of confirmation from an objective point of view, it is not thus that they arise; and it is not from the objective but the subjective side that we must enter the field of ethics in search of a natural basis for the science of jurisprudence. In relation to the creature and to created existence, we begin not with duties but with rights, just as in the process of respiration we begin with inspiration and not with expiration.

My neighbour is but a reflected image of me. I cannot interrogate his consciousness, or ascertain the revelations that nature makes to him. My knowledge of his rights and duties

<sup>1</sup> "Men come into the world," says Mr Leckie, "with their benevolent affections very inferior in power to their selfish, and the function of morals is to invert this order. The extinction of all selfish feeling is impossible for an individual, and if it were general, it would result in the dissolution of society. The question of morals must always be a question of proportion or degree."—Leckie's *Europ. Morals*, vol. i. p. 103; see also p. 4. Now, if the extinction of this feeling would result in the dissolution of society, how can an approximation to this extinction be the question of morals? Is society held together only by a principle which morality seeks to extinguish? The false antithesis between the subjective and objective-sides of duty, and the representation of the former as vice and the latter as virtue, is an error which pervades the whole of this learned and most interesting work.

is thus only inferential. It is an inference, as we shall see presently, which my nature compels me to draw. Still it is an inference derived from self-knowledge; and if I do not know that my own rights and duties are absolute, I have no ground for inferring that his are so. An abandonment of the absolute character of subjective rights is thus an abandonment of the absolute character of objective rights—*i.e.*, of morality altogether.

The true view of the matter, and that in which the opposing systems represented in this country by Hobbes and Hutcheson—who were, however, by no means their originators—find their meeting-point and their complement, I believe to be this.

Our subjective rights, though not rights exigible by us against God, are not the less on that account rights exigible by God against us, and by us against others in God's name, for the simple reason that they are rights inherent in the nature which God has formed, and with which, by the act of its creation, He has identified Himself. To these rights, duties to God, and through Him to our own nature, correspond, the fulfilment of which, in His eyes, and with reference to the whole scheme of His government, are just as imperative as those which correspond to the objective rights of others. Moreover, that the performance of these duties on man's part possesses the character of virtue, not less than the performance of his duties to his neighbour, will, I think, be apparent from two considerations.

1st, The acts which these duties imply—*viz.*, self-defence, self-support, self-respect, self-development, and in the end, it may be, the still harder task of bearing life under intense

bodily and mental suffering till God in His mercy shall take it away,—all these are voluntary acts, often neglected, and when performed at all, performed often at a fearful sacrifice of present ease, or immediate relief.

2*d*, Being acts which tend to the realization of the idea of nature, they are in accordance with that nature as a whole, and consequently with the will of its Author and the scheme of His government. But acts voluntarily performed, in opposition to the abnormal and exceptional impulses of our nature, with a view to the realization of its central idea, fulfil, as it seems to me, all the conditions which attach to the idea of virtue.

Another consideration which points at the same conclusion is this. In popular speech we continually talk of “duties to ourselves;” and the existence of such duties is not denied even by those who refuse to assign to their discharge the character of virtue. Self-respect, they say, imposes on every man the duty of supporting himself to the extent of not becoming a burden on his relatives or the parish. But why should the duty stop there? The very same principle which carries him the length of not being an object of self-reproach, does not cease to appeal to him till he has availed himself, to the fullest extent, of the powers which God has bestowed on him; and the extent to which, and the circumstances in which, this duty is performed, are the measure of the virtue which attaches to the performance. I do not qualify the character which I assign to this duty even by saying that its fulfilment is a virtue “to the fullest extent compatible with the interests of others,” because the interests of all are not only reconcilable, but inseparable, and the highest forms of self-interest and

benevolence are ultimately identical.<sup>1</sup> It is from the latent consciousness of the equal sanctity which attaches to all natural rights, and the fact of the identity of interests, that the very same acts which the one class of philosophers lauds as benevolent and virtuous, the other, on selfish grounds, commends as useful, and that the practical outcome of the two systems is far less divergent than their authors believe and intend. On the other hand, however, the effect of the one-sidedness which belongs to them both is but too often exhibited in the tendency of the one to a forgetfulness of our duties to ourselves, which ends either in morbid self-condemnation or insincere sentimentalism; and of the other to a forgetfulness of our duties to others, which leads to acts of flagrant injustice. The remedy is the very simple and obvious one of conforming to the law of integrity<sup>2</sup> by remembering that we are God's creatures ourselves as well as our neighbours, and that His command to us with reference to others will be fulfilled if we love them, as He desires and intends that we should love ourselves.

3. *In our relation to creation, animate and inanimate, nature reveals rights.*

(a) *The fact of being involves the right to be.*—Law and fact, like right and might—like truth and existence<sup>3</sup>—in the last

<sup>1</sup> "The happiness and welfare of mankind are evolved much more from our selfish than from what are termed our virtuous acts," &c.; and yet he regards the former as vicious and the latter as virtuous!—Leckie, vol. i. p. 38. Does not such a train of reflection show that what are termed our selfish may be also our virtuous acts? Selfishness, as we shall see below, consists of self-assertion pushed beyond the point at which it begins to be self-contradictory and suicidal—*infra*, cap. xii.

<sup>2</sup> *Ante*, p. 183.

<sup>3</sup> Ferrier's *Institutes of Metaphysic*.

analysis, are identical, and therefore it is that Plato has said that law is the finding out of what really is—*τὸν ὄντος ἐξέρεσις*.<sup>1</sup> Though the relation of Creator and creature excludes the idea of a right to existence on the part of the latter, the moment existence is conferred that relation bestows on it the character of a right which neither its possessor nor any other creature is entitled to dispute.<sup>2</sup> In life, as a phenomenon presented to us by consciousness, we have thus a revelation not only of the fact of possession, but of the idea of property—*i.e.*, of possession held on a title, or possession and right. But, further, the consciousness of life is a feeling of separation from, and independence of, other created organisms. It is a feeling, not of abstract and general, but of concrete and special, existence—not of *something is*, but of *I am*. Nor is this feeling of individuality a consciousness of separation merely, but of power and energy to resist surrounding influences which tend to produce dissolution or absorption.<sup>3</sup> The *Ego* consists in, and is measured by, the power which it possesses to dispense with the aid, and resist the influences of the *non-Ego*; and as the right corresponds to the fact of existence, we thus perceive that the measure of the *right to be* is the *power of being*. In subjective morality we thus find the origin, as in objective morality, rightly understood, I trust we shall find the justification, of the recognition of *de facto* power and possession in every department of jurisprudence.

(b) *The right to be involves the right to continue to be.*—The

<sup>1</sup> Culverwell, p. 43.

<sup>2</sup> Cousin, *Philosophie Sensualiste*, p. 322.

<sup>3</sup> It is in the consciousness of free energy that the *Ego* perceives and affirms its own existence.—Cousin, *ut sup.*



existence of which we are thus the rightful possessors is an existence in time. The right to be consequently brings along with it a right to continue to be, which, in its duration as in its extent, is limited only by the power of its assertion. In this natural right to continue our existence we behold the origin of the right of self-defence, and of the laws which we enact for the security of the person ; whereas in its objective or reflected aspect, as we shall see hereafter, it imposes the duty not only of protecting the lives of other human beings, but of prohibiting, and, as far as we are able, preventing the wanton destruction of human, animal, or even vegetable life.

(c) *Like the right to be, the right to continue to be has no validity against God.*—The withdrawal of the power to live, by Him, is a withdrawal of the right to live ; and there is, consequently, no injustice, in any sense which created beings can attach to that word, in natural death, or in natural decay. The shrinking which we feel from natural dissolution, in so far as it is a natural sentiment, is probably an instinct which is reflected on our finite from our infinite nature. We are reluctant to leave what consciousness tells us is an unfinished task ; and if we take the *ars longa* in its highest conception as the realization of the idea of humanity in the individual and in society, it affords the strongest argument in favour of the belief that the *vita brevis* applies to this life only. It is at variance with our necessary conception of the Divinity that He should not enable us to complete a work which He has assigned to us ; to realize an idea that He has set up within us ; and the limitation of conscious existence to

this life thus seems to involve a contradiction. But, on the other hand, immortality in this world is manifestly at variance with the scheme of the universe, as we see it with our own eyes. When, from the incapacity of a man's existing organism, spiritual and corporeal, to sustain further development, or even continued activity, the period of his natural death has arrived, he has no more right to live than he had to be born before his time, or to be raised from the dead. His right, then, is to die; for it is by that reorganization, that new synthesis which follows on the analysis which we call death, that alone he can be righted—*i.e.*, kept in harmony with organic existence as a whole, and enabled to live—in Kosmos. What is true of individual is probably not less true of national life; and as regards both we can thus see, even by the light of reason, that "to die is gain."

(d) *The right to be, and to continue to be, implies a right to the conditions of existence.*

Hitherto we have considered life as consisting only of the power of repelling aggression, with its corresponding right. But active qualities of another class belong not less certainly to its essence, and its continuance is not less obviously dependent on their exercise. These are the powers which every living organism possesses of attracting to itself and assimilating such external agencies as are necessary to its being. As our natural powers of repulsion furnish the warrant for our laws of self-protection, so it is in the powers of attraction of which we now speak that our rights of property and laws of exclusive<sup>1</sup> possession originate.

<sup>1</sup> The importance of exclusiveness as an element in value is dwelt upon by

It is when the idea of property is seen in its inseparable connection, not only with the life of man, but with organic existence altogether, that we get hold of the final answer to that whole phalanx of social, political, and economical errors, which, under the names of communism, socialism, levelling, equality, and the like, have so tortured mankind, which still make up the popular conception of what, abroad, is called "the revolution," and of what we and the Americans are apt to include in our conceptions of "progress."

The powers of respiration and digestion, by which animal life is sustained, exhibit themselves in acts of appropriation<sup>1</sup> which are involuntary even in man; and it is obvious, consequently, that the amount of appropriation which these powers warrant, in other words, which nature dictates to them, is the amount of which they are capable. The lungs of a man, or of a horse, are capable of decomposing, and their stomachs of digesting, a vastly greater amount of nutriment than the lungs or the stomachs of a monkey or a mouse; and to precisely the quantity which the animal can appropriate, the animal, in each case, is entitled, so long as he is entitled to be an animal at all. Nay, in proportion to the extent to which the powers of life increase or diminish in the same animal, does his right to the conditions of life go along with them. A child is not entitled to a grown man's food, either in quantity or in quality; nor a sick man to the food of a

Aristotle, *Polit.*, ii. 1.—*ἥκιστα γὰρ ἐπιμελείας τυγχάνει τὸ πλείστων κοινόν*—a significant hint for the communists.

<sup>1</sup> The act of appropriation supplies the element of labour, which certainly accompanies but does not constitute the right of property, seeing that labour presupposes power, and power presupposes life, and life is property.

man in health ; and though the child or the sick man should possess boundless wealth, we do not hesitate to impose restraints on either of them.

Nor is the law that life confers rights to its exercise, corresponding in extent to the powers of which it consists, confined to animal life. By analogy it embraces the whole range of organized being. The life of a tree, we have every reason to believe, is an unconscious life ; and the tree has therefore no rights or duties in the human sense, or even in the more limited form in which they may be ascribed to the higher animals. But the life of the tree involves, or implies, this very same power of preserving its separate existence by what, analogically, may be called acts, not of repulsion merely, but of aggression and appropriation. So long as it lives, and in proportion to the life which is in it, it resists the influences which produce decomposition, and assimilates the substances which conduce to its support. Farther, the particles of carbon, oxygen, hydrogen, &c., which the tree takes up from the circumjacent earth and circumambient air, become, in a sense, its property—property which it holds by the very same tenure by which it holds its life, whereas, up to the moment of appropriation, no such relation subsisted between them.

But the analogy between vegetable life and those acts of appropriation by which man vindicates the rights of his being is a very limited one. It is not till we reach the higher animals that we come in contact with voluntary activity, and begin to trace, in the germ, that consciousness of the relation between power and right which lies at the root of the human

idea of justice. When a stag stands at bay, when a dog barks on his chain, growls over a bone, or manifests affections which often place him in favourable contrast with human beings, they give unequivocal indications of a sense that life, liberty, external objects, and individual sentiments belong to them, are theirs, their property; and we find, moreover, that our instinctive tendency to recognize the justice or righteousness of this sentiment is precisely in proportion to the power which it exhibits.<sup>1</sup> The needless destruction of a worm, like that of a flower or a shrub, scarcely rises above the character of malicious mischief. But the needless destruction of a horse or a dog, the wanton infliction on them of suffering, or even the unnecessary limitation of their liberty or their enjoyments, we have no hesitation in regarding as cruelty, or injustice to them, and, on man's part, as an unjust violation of their rights. We would not for the world even hurt their feelings. In the case of the higher animals, then, it is apparent that life can be justifiably taken away, or liberty restrained, only on behalf of life or liberty, with a view, *i.e.*, to the securing more or higher life or liberty on the whole. We may kill an ox to eat him, and there are objects for the attainment of which perhaps even human life may justifiably be taken away; but if we kill an ox, even if it be our own ox, from mere wanton love of destruction, we

<sup>1</sup> Both Hegel and Fichte deny the rights of animals altogether, and reduce them to living machines. Fichte said that the cry of an animal means no more than the creaking of the hinge of a door. The veriest Cockney in England knows them better. Krause does not go quite so far, but he doubts if animals have rights, p. 98. Surely even the doubt vanishes if we accept *power* as the source of *right*, for of their powers there can be no question.



do a cruel and wicked act; and if we kill a man in similar circumstances, we commit murder.

It is to these natural feelings, rather than to any real belief in a metempsychosis, that the doctrine of the absolute sacredness of life has been indebted for its advocates in historical circumstances so various. In like manner it is from the protection which nature herself casts around them that the degree of safety to life and property attained is the surest test of the grade of civilization which a community has reached.

Professor Röder, and many other excellent thinkers and writers of the school of Krause, are of opinion that there are no circumstances in which the voluntary destruction of human life is not a violation of natural law. The higher animals, they say, may destroy the lower, but man being the highest created existence on earth, his life can be lawfully taken away by God only. Its destruction by man never can promote life on the whole, though it may seem to do so in an individual instance, or at a particular stage of social progress. This argument, though it does not involve vegetarianism, appears to carry us the length of an absolute prohibition not only of capital punishment, but of war. Whether the consciousness of humanity, under the guidance of Christian influences, be not developing itself in directions which may render the acceptance even of these consequences imperative, is a question on which it is not desirable that we should enlarge in this place. A few words, however, I shall venture to say, by way of placing the discussion on what I conceive to be its true basis.

The question which has been so often asked, whether the

right to punish, and, above all, to punish capitally, be an absolute or a relative right, arises, as it seems to me, from a confusion between natural and positive law. Natural law, resting on a *postulate* of the rectitude of nature, is necessarily absolute. As an end in itself, it is to be vindicated for its own sake. Positive law, on the other hand, as its realization in time and place, is absolute only on condition of this realization, and to the extent to which it is effected. If positive law realizes absolute law, it partakes of its absolute character—if I may be permitted the phrase, it is relatively absolute. Now the law which inflicts capital punishment for murder is a positive law. The natural, absolute law is “Thou shalt not kill.” That law is imposed on us by our nature, and, for us at least, it is an end in itself. The positive law which says the killer shall be killed, is absolute only in so far as it tends to prevent killing, and thus to realize the natural law. It proceeds on the assumption that he who has killed once is likely to kill again; that his example will incite others to kill; and that killing, on the whole, will be prevented by killing him. If there be an easier and cheaper mode of vindicating the absolute law—*i.e.*, a mode in which the murderer’s life can be spared without sacrificing other lives, then capital punishment is forbidden by the absolute law by which on the opposite assumption it was justified; but that is a question which can be answered only relatively, and to which the same answer will not be always and everywhere the true one. The argument against this relative view of capital punishment is that the absolute law, “Thou shalt not kill,” applies to society as well as to its individual members,

and that capital punishment is thus a violation of an absolute, natural law, be the circumstances what they may. To this the answer is that society stands in God's place as regards its individual members, and that God takes life away in accordance with laws which we assume to be righteous. The final difficulty for the relative argument seems to be that God gives life, and society does not. But to admit this as an argument against capital punishment would be to admit it as an argument against all punishment. Society can no more restore time or liberty than it can restore life. Society, or the general will, it is true, is an imperfect realization of absolute justice, but it is the only possible realization of it on earth. The theory of the divine right of sovereignty was an error, only when sovereignty was centred in a single will; for till we remount to an earthly *absolute*, there is no ultimate resting-place or starting-point for positive law of any kind. The fact that one form of punishment attains the object of the absolute law better than another must be proved; but the competence of the legislature to determine the adequacy of the proof must be assumed as the hypothesis on which all positive law rests. This relative view of the right of society to punish, even capitally, is, of course, at variance with Kant's famous saying, that though society were on the point of dissolution, the last murderer ought to be put to death. Human punishment, I think, has always reference to the future, and as here there is *ex hypothesi, no future*, the killing being justified by no hope of preventing killing, would fall under the prohibition "Thou shalt not kill." The case would be in God's hands. The same line of argument which we

have here indicated with reference to capital punishment, yields, of course, the same relative result with reference to another question much agitated in our midst—the question, viz., of vivisection. I never could see that anything beyond a relative or hypothetical answer could be given in this case either. If the suffering and loss of life caused by vivisection does diminish suffering and save life, and life of a higher kind,—on the whole, then, *to the extent to which it does so*, it is justified, but not otherwise or farther. Both end in questions of fact, not of principle. The former question—that of capital punishment—seems to admit of the application of the ordinary statistical method of inquiry; and the application of that method has recently led to a revival of the practice in several countries in which it had been abandoned. To get the vivisection question out of the region of opinion, or perhaps of interested assertion, seems much more difficult. Even supposing his object to be justifiable, who but the experimenter can tell how many experiments may be requisite to attain it?

(e) *The right to be implies a right to develop our being, and to the conditions of its development.*—It is in the consciousness of the right and duty of self-development that the peculiar characteristics of humanity ultimately exhibit themselves. The acts by which the higher members of the brute creation assert their rights are neither involuntary nor, in a certain sense, unconscious; but they have reference either to the continuance and transmission of existence as it is, or, at most, to the growth of the physical frame. If there be anything beyond this, it takes place in accordance with laws of pro-



gress which do not affect the relations between rights and powers at each stage of the action of these laws. Whatever may be the answer which shall ultimately be given to the question as to the relation between apes and men, that answer will not affect the assertion that there is analogy enough between physical growth or animal training on the one hand, and spiritual development on the other, to exhibit the universality of the law that powers assign the only limits to rights, and that rights involve the conditions of their own assertion. The right of development in man exceeds the right of development in the other creatures, precisely in proportion to the extent to which his capacities of development surpass theirs. The rights of the man will exceed the rights of the ape, so long as the one continues to be a man and the other an ape, and the question whether or not the one may pass into the other is nothing to the purpose. And the same law holds true in reference to individual members and races of the human species. It is no more possible to bring natural inequalities to a level by means of education, than to teach music to the deaf or painting to the blind; and what we are forbidden to accomplish we are not called upon to attempt. Moreover, as man, even physically considered, is the most dependent of animals, so it is in this peculiarly human direction that his dependence becomes most conspicuous. Our physical growth, like that of any other animal, will attain its possible limits by the aid of our parents and a very few of those with whom we are immediately surrounded. But the spiritual maturity of a single individual, in so far as it is attainable at all, will be the result of the past and present



efforts of the whole human family. So far, then, from searching for the ultimate characteristics of humanity in primitive man, the chances of finding them, or rather of approximating them, in individuals or in generations, will always be in favour of those on whom the widest range of historical influences has been brought to bear. Unlike the lower creatures, the alternative of a stationary existence, even within the limits of his own species, is not offered to man. His choice lies between progress—which, in so far as his individual powers permit, knows no limits short of absolute conformity with the divine nature, which is the true human ideal—and moral and intellectual retrogression, which ultimately becomes irreconcilable even with his physical existence, and is mercifully cut short by his disappearance from the earth. A non-historical is usually a decaying race; and the same is true of families, for the simple reason that men do not record activity or indolence of which they are ashamed. It is consequently not without reason that the presumption of society is in favour of families having long pedigrees. It is in this peculiarity of our nature that we see the foundation of the right of the individual to demand such education as he has capacity to receive on the one hand, and of the duty of the parent, and of the State, to communicate it on the other. Nor is there any other point of view in which the righteousness of the principle of *les carrières ouvertes* becomes more apparent, both in a subjective and an objective direction, than this. To rob a man of the fruits of such powers of spiritual development as God may have seen fit to implant in him, is the last and highest form of injustice; whereas

as regards others, the loss of a single man of genius (supposing such an event to be possible) would, in most cases, be a far greater disaster than the loss of a battle even to the community in which it occurred, whilst it would be one in which mankind and futurity would participate far more extensively.

The question of education by the State, like that of charity by the State, and, indeed, like positive law altogether, is thus reduced from a question of principle to a question of fact. In so far as individuals or communities will or can educate themselves, that is the arrangement which nature approves in the first instance. If they will not, or cannot, then State interference assumes the aspect of a subjective right, the reality of which is guaranteed by the existence of an indisputable objective duty. *Free* State schools are justifiable only under the same limitations as *free* State charity; and the same principle applies to aided schools, in so far as the aid exceeds the benefits conferred on the classes from whom it is derived. Compulsory attendance is a substitute for voluntary attendance which only necessity can justify, but which necessity unquestionably does justify. It is an interference with lower in behalf of higher freedom of the individual. It is the State treating the parents just as the parents treat, or ought to treat, their children—imposing on them the bondage of school, that they may be freed from the greater bondage of ignorance. All questions as to rights thus resolve themselves into questions as to capacities or powers. Till the presence of these has been established, the rights do not emerge. But their absence must not be hastily assumed; and on whatever career any individual wishes to enter, that

career he or she is clearly entitled to have thrown open to him or to her. The desire is a *prima facie* proof of the power. That the distinctions which nature has established between the functions of the sexes, and the endowments of individuals and races of mankind, will speedily make themselves apparent, is a subject with reference to which we may spare ourselves all anxiety. Of the clearness with which these considerations are everywhere forcing themselves on the public mind, in our own day, the adoption, and probably the exaggeration,<sup>1</sup> of the system of competitive examinations, is perhaps the most conspicuous proof.

(f) *The right to be involves the right to reproduce and multiply our being.*

No divine command, directly given, is more obviously in unison with the promptings of nature as revealed by consciousness, than the command to "be fruitful and multiply." After the instinct of self-preservation, by far the most powerful, in all healthy natures, is that of propagation. The concomitant of man's purest and loftiest affections and of his vilest and most degrading passions, inextricably intertwined with his moral as with his physical life, the root of the family, the mainspring of ambition, the incentive to vanity, it is not wonderful that its due regulation should occupy so large a space in every code of laws, civil and criminal. The power of reproducing our species being nature's compensation for the waste of individual life and the limits which she has imposed on its duration, is usually manifested in greatest vigour in the circumstances which appear most to call for its

<sup>1</sup> *Thoughts upon Government*, by Arthur Helps, p. 62.

exercise. New communities grow vastly more rapidly than old ones: colonizing than stay-at-home nations: the ravages of war and pestilence are supplied with wonderful rapidity: and even the high death-rate occasioned by our manufacturing system and our city life, is compensated by a birth-rate unknown amongst the long-lived inhabitants of our rural districts. In all this the closest analogy is apparent between man and "the grass of the field." The command which nature lays upon the one she fulfils spontaneously in the other. Again, the contradiction which seems to arise between the command on the one hand, and the narrow limits within which obedience to it appears necessarily to be confined, finds its counterpart both in the lower animals and in the vegetable creation, and thus the action of those legal and even social impediments to marriage, which sometimes present themselves to the mind as the worst of evils, take their place in the general arrangements of nature. Of the pollen which is scattered by every summer wind, and even of the seed which every autumn ripens, the proportion which comes to maturity as plants and trees is certainly not greater than that of the human beings that spring from the endless potentialities which seem to lie in every community and in each generation. Amongst all animals, again, with the exception of man, the limitations to multiplication which man feels called upon voluntarily to impose on himself, are involuntarily enforced, not only by the necessities of the carnivorous species, but by the power of propagation being dependent on physical conditions which recur only at certain seasons. The object of nature, throughout, seems to be the

reproduction of the same type, not deteriorated, but, if possible, improved by individual selection ; and the object of all marriage-laws which obey her behests, will be the production of the greatest possible amount, not of animal being, but of human wellbeing. A man who cannot bestow a human education on his children has no more natural right to marry than a man who cannot beget them. But how the poor or improvident man can legally be prohibited from marrying, is a problem which no legislator has yet succeeded in solving, and which probably does not belong to legislation. There is yet one other direction in which the analogy which runs through the natural laws of reproduction, both in the vegetable and animal kingdoms, is suggestive. Weeds grow more readily and multiply more rapidly than grain ; reptiles than animals suited for domestic purposes ; and worthless, improvident, and diseased human beings, than those that are virtuous, frugal, and healthy. Why it should be so is a question which we must probably be contented to hand over, unanswered, to that element of apparent contradiction in the government of the universe, which will for ever defy explanation by us. But the political suggestion which is offered by the undoubted fact is very obvious—viz., that it is not by positive restriction imposed by our marriage-laws, which would certainly be inoperative, but by improving the conditions of life physically, but still more intellectually and morally, of the whole people, that we must seek for a remedy to the evil of over-population. If the festering masses which congregate in our great centres of population could be spread over the land, and raised to the position of intelligence and wellbeing of the prosperous rural



population of this and other countries, the problem of overpopulation would be solved by those natural laws on the continued action of which we can safely rely. Let us hope that, to some extent, this may be effected by those changes in our land-laws which are now in contemplation. But, at all events, do not let us delude ourselves by regarding the rapid multiplication of our town-populations as anything else than an indication of the low conditions of their *average* life. Of the many *idola insulæ* which we cherish, few have been so hurtful to us as that of accepting our birth-rate as a test of material wellbeing.

(g) *The right to reproduce and multiply our being involves the right of transmitting to our offspring the conditions of the existence which we confer.*

As regards our children and our direct descendants, the right of transmitting property springs as obviously from the right of transmitting life, as the right to possess property springs from the right to possess life. And inasmuch as the character of the life which we possess determines the character of its conditions, so it is of the life which we transmit. We are entitled not only to live, but to live humanly; and the life which we are entitled to transmit is not bare existence in the abstract, but human existence. Human life, however, involves the conditions, not only of its continuance, but of its development, and in this respect also the same privileges cling to the life which we are entitled to transmit. What is commonly and quite correctly regarded as a duty to our children, is thus at the same time a right inherent in ourselves, which we are entitled to assert as against other created existences; and our

laws of inheritance, as well as our laws of property, have thus their root in the subjective *persona*, and their validity when seen simply from the subjective side.

(h) *The right to be involves the right to dispose of the fruits of being, inter vivos.*

The children we beget are fruits which grow on the tree of life. Up to the period of maturity, the rights of the tree to its fruits are the same as to its leaves. They are part of it, and cannot be separated from it without injustice—injury to it, destruction to them, loss, in short, to organized existence. But this right terminates when the period arrives at which the tree no longer draws nourishment from, or communicates nourishment to, the fruit. The ripe fruit falls to the ground, and becomes directly or indirectly a source of separate organic life. Now, a relation very closely analogous to this subsists between human beings and the fruits of their bodies. In the earlier and ruder stages of society, children are regarded as the property of their parents, and, till they have attained to maturity, they continue in civilized states to be more or less closely dependent on the parent stem. In this principle we see the natural foundation of the laws of guardianship, and their natural limits, and the answer to all those fraternal theories of separate and independent individual rights so prevalent in France and other democratic countries at the present time, on the one hand, and to the paternal theories of the old despotic monarchies and aristocratic republics, on the other.

Nor do the rights of man to the fruits of his labour differ from those to the fruit of his loins, either in their origin or

in the principle which limits them. Property, as we have seen, is a consequence of life ;<sup>1</sup> like life it is God's gift, and, absolutely considered, it is God alone who can take it away. Till this occurs, the rights of the proprietor are limited only by his capacities of use and enjoyment.<sup>2</sup> He may sell it—*i.e.*, exchange it for property in another form—or give it away, even to a stranger, for any object which is not insane or criminal,—for any object, that is, which is not really at variance with his own use of it. But the right to property which nature reveals affords no warrant for waste, or for the exercise of mere caprice. A blind man, for example, would have no right to burn a library, or a picture-gallery, which belonged to him, or even to shut it up,<sup>3</sup> though he might sell it, or exchange it, or give it away. On the same ground, that there is no right of mere exclusion, it has become an established rule of international law, that an unoccupied country cannot be acquired, even by the first discoverer, by a proclamation, the setting up of a flag, or the like, but must be actually taken possession of, and occupied. We know how utterly futile were all those “proprietary grants” of unoccupied territory in America to private individuals by the Stuart kings.<sup>4</sup> Indeed, it is in the inseparable relation between rights and powers of use and enjoyment, as we shall see more fully hereafter,<sup>5</sup> that the *de facto* principle, in all its applications, finds

<sup>1</sup> *Ante*, p. 215.

<sup>2</sup> *Ante*, p. 216.

<sup>3</sup> May a total abstainer build up his cellar, as a distinguished citizen of Edinburgh is said to have done? No! If he is right in condemning the use of strong drink, he is bound to destroy it; if he is wrong, he is not entitled to keep it from his friends.

<sup>4</sup> Creasy's *Constitutions*, p. 120.

<sup>5</sup> *Infra*, Book ii. cap. iv.

its justification. Whether this principle may not be found to limit the rights of private property in directions which have scarcely been thought of as yet, is a question which the future alone can answer. History is full of examples in which principles have been revealed by events; and the Irish Land Bill of 1870 (33 & 34 Vict. c. 46) was probably only a commencement, in this country, of that legislation for the conversion of nominal into real proprietorship, in the direction of which almost all the progressive countries of Europe seem to be tending.<sup>1</sup> The great practical obstacle to all legislation affecting rights of exclusive possession, even where these have been confessedly carried to the extent of being self-destructive, arises from the irrational and criminal outcry for equalization to which it immediately gives rise. It may be possible, as is often asserted, that, by a redistribution of land, and readjustment of taxation, which would in nowise affect the relative importance or essential wellbeing of the propertied classes, combined with a system of compulsory education maintained by the State, the evils and dangers both of pauperism and proletarianism might be in a great measure removed. But no such arrangement is possible so long as the ignorant majority claim, and are incited to claim, not only that they shall be relieved of all the burdens, but that they shall absorb the whole authority of the State. Graduated taxation might possibly be a great benefit, but it might also be a great evil, to the community; for it means either a corresponding graduation of political power, or else confiscation of

<sup>1</sup> Reports from Her Majesty's Representatives respecting the Tenure of Land in the several countries of Europe, 1869-70.

the property of the few by the many—*i.e.*, public robbery, public demoralization, and the ultimate loss of civilization, not spiritual alone, but also material.

(i) *The right to be involves the right to dispose of the fruits of being, mortis causâ.*

The right of executing *mortis causâ* dispositions would at first sight seem to be excluded by a doctrine which declares that all rights originate in life, that they continue to be measured by life, and terminate with life. But if we analyze the character of such transactions more closely, we shall find that, to the full extent to which they are legitimate at all, they originate in the powers of life, and thus fall fairly within the scope of the *de facto* principle. And here the first consideration which presents itself is that a *mortis causâ* deed is a transaction, not between a dead man and a living man, but between two living men,—the man who gives at the moment of giving, and the man who receives at the moment of receiving, are both in possession of the powers of life—to the extent, at all events, of being capable of consent. The only difference between it and what are usually known as transactions *inter vivos* arises from the fact that the one man must have lost his power of giving before the other can exercise his power of receiving. But this difference loses its importance when we consider that, substantially, the same thing takes place in every transference. In the very act of transferring a pound of tea, we shall say, the proprietor, *quâ* proprietor, expires—his proprietorship ceases, just as much as if he had dropt down dead. Now this is precisely what occurs when, at the moment of death, the property of one man becomes the property of another. The proprietary will of the testator



gives place to the proprietary will of the heir, just as the proprietary will of the seller gives place to the proprietary will of the buyer. The apparent difficulty arises from the fact that because a period after death must intervene before the fact of transference can be *proved*, we imagine that such a period intervenes before the fact of transference exists, and, consequently, that it is an act of the dead. But the transference, in all cases, is instantaneous. The last breath of the expiring proprietor is immediately followed by the first breath of his successor, and thus "the king never dies."<sup>1</sup> Again, it may be said that deeds to take effect after death are, necessarily, future, and that, in this respect at least, they differ from those which are intended to receive present execution. To this objection the answer is, that inasmuch as the present, so to speak, is a mathematical point of time, every transaction necessarily has reference to the future; and, further, that inasmuch as life is uncertain, every transaction, tacitly at least, contemplates the possibility of its execution after death. But the only effect of physical death is to mark the point of dissolution of the proprietary will. Even the impossibility of predetermining the period of death makes no difference; for have we not bills of exchange payable at sight, on presentation, to order, and even conditionally? But the heir of the

<sup>1</sup> In the case of transference by offer and acceptance conducted by correspondence, a considerable time must elapse between the act of will which constitutes the offer and that which constitutes the acceptance. The point of transference is that at which the wills meet, and the intermediate death of the offerer does not prevent this occurrence. The heir of the offerer cannot repudiate the offer on the ground that the offerer died before the offer was accepted.

testator, it may be said, may repudiate the succession. The answer to this is that, if one heir repudiates, the next may take, and that, failing all of them, the will to take is always present in the Crown. On the part of some heir there is thus always *present* will to meet that of the testator's at the moment of death. On one occasion, I remember that an ingenious objection was made to this train of reasoning by one of my pupils, to the effect that no man dies willingly, and that therefore there is no act of volition on the part of the testator. Supposing the fact to be true, all that the objection amounts to, I think, is that the act of will is conditional, and conditioned only by an occurrence which the testator knows to be inevitable. As regards their origin, there is thus no difference at all between rights of transmitting the fruits of life *inter vivos* and *mortis causâ*.

(j) *All our subjective rights resolve themselves into the right to liberty.*

The right to liberty—*i.e.*, to the exercise of our own subjective powers—not only embraces the rights we have mentioned, but it transcends them. Passing into the sphere of objectivity, it constitutes a claim on the aid of our fellow-men. Liberty has thus a positive as well as a negative side; it is a claim not only not to be hindered, but to be helped. This right to the positive conditions of liberty, as we shall see, is the correlative to the duties of mutual aid and charity, and forms the basis of the positive side of jurisprudence, the claims of which form so prominent an object in the teaching of the later schools of Germany.

(k) *In the limitations which nature imposes on our subjective rights, we have the first revelation of the principle of order.*

Order is popularly supposed to spring entirely from objective rights. Let us see how the matter really stands. In the dicta of our subjective nature we have found a warrant for that side of jurisprudence by which our liberties are asserted and vindicated. We have seen that the right to be, is but a summary expression for the right to the free exercise and development of the powers of our physical and rational existence. We have seen, moreover, in each particular instance, that the rights of which we become conscious are not absolute and unlimited, but relative to, and circumscribed by, the powers in which they inhere. Absolute rights, like absolute powers, belong to God only. He no more communicates the former to His creatures than the latter, and it thus appears that our rights are limited, not, as is generally supposed, by rights which are opposed to them, but in their own nature. Each individual comes into existence and continues to exist only to the extent of his powers. When these powers cease the rights are non-existent. The great subjective limitation is death. Without quitting the region of subjectivity, we thus perceive the error of opposing objective to subjective interests, and of supposing that our rights to life, liberty, property, and the like, owe their limitations to the necessity of sharing them with our fellow-creatures. So far is this from being so, that whereas the subjective limitations of our rights are real, the objective limitations, in so far as they are in accordance with natural law at all, are only apparent. I may appear to

abandon, in your behalf, rights which but for you I should have enjoyed. But the abandonment, in so far as natural law calls upon me to perform it, is in reality a gain to me precisely to the same extent to which it is a gain to you. The recognition of your rights is just as much a condition of the exercise of mine, as the acts of appropriation which I make on my own behalf. In myself, however, I am a finite and limited being, and the subjective limitations of my rights are realities which consciousness reveals to me, and which do not admit of being explained away. Now these limitations, marking off as they do the sphere of subjective from that of objective activity, are manifestations of the principle of order ; and thus order takes its proper place, not as an end in itself, as it has been the custom of despotic governments to maintain, but as a means towards the attainment of liberty, which is the end of jurisprudence, and which, in its turn, as we shall see hereafter, becomes a means towards the attainment of the ultimate ends of human life.<sup>1</sup>

(*l*) *Nature reveals to us the possibility and the consequences of the transgression of her laws.*

Taken simply as a phenomenon,<sup>2</sup> no revelation of subjective consciousness is more unequivocal than the freedom of the will. Though nature tells us neither of powers nor of rights which transcend her limits, she informs us that we are at perfect liberty to transgress them. But here a singular anomaly appears. The consciousness of power is no longer accom-

<sup>1</sup> *Infra*, Book ii. cap. i.

<sup>2</sup> As to the value of this phenomenon in the controversy between Liberty and Necessity, see Hamilton's *Metaph.*, vol. ii. p. 542.

panied by the consciousness of right. In abandoning us to ourselves and rendering us the authors of our own actions, nature does not deceive us. On the contrary, as we have seen, she bestows on us an autonomous character, which she mercifully places beyond the reach of our volition, and thus not only enables us to discover, but forces us to feel, that all transgressions of her laws are acts of subjective as well as of objective injustice, and that, apart from considerations of future rewards and punishments altogether, every sin or folly which we commit is, in principle, an act of self-destruction. The suicidal character of abnormal and inharmonious action, is a doctrine which the revelation of nature teaches as unequivocally as the revelation of Holy Writ; though it leaves the remedy against the mysterious propensity which seems to reside in each of our separate tendencies to assert itself in isolation, and to claim an exclusive dominion over us, a hopeless enigma. It is in the limitation which this mysterious element of imperfection, the presence of which in our phenomenal nature we cannot ignore, imposes on the freedom of our will, that we recognize the necessity of admitting the abnormal relations of war, neutrality, &c., within the pale of jurisprudence. It is with a view to their annihilation alone that they are recognized. Jurisprudence refuses to take cognizance of them otherwise than as vanishing quantities.

(m) *Nature reveals objective rights which exactly correspond to our subjective rights.*

The question whether or not objective rights, or, in other words, the objective side of morality (which, as we have seen, has often been erroneously regarded as embracing morality



altogether),<sup>1</sup> rest upon nature or upon convention; and, consequently, whether a science of jurisprudence, or of equal justice between man and man, be possible or impossible, turns wholly on the previous question, whether our recognition of objective rights springs from the same source, and rests on the same basis, as that of the subjective rights which we have just considered. We have seen that the so-called selfish system speaks with the voice of nature in what it claims for the *Ego*. As regards the relations of creatures to each other, we have farther seen that rights precede duties.<sup>2</sup> We have adopted the dictum of Spinoza, that "nature, considered in general, has a sovereign right over everything which is within her power—that is to say, that the rights of nature extend just as far as her power extends."<sup>3</sup> Must we then follow him the whole length to which he himself, reluctantly, followed Hobbes, and concur in rejecting the counter-dictum of Grotius, that "it is false to say that, by nature, every animal is impelled to seek only its own advantage"?<sup>4</sup>

Now this question appears already to have received its answer from the subjective revelations with which we have become acquainted.

In the limitations inherent in our subjective rights, and in their dependence for their assertion on our recognition of the objective rights which are erroneously supposed to limit them, we have discovered, as it were, the unappropriated territory which nature assigns to objective activity. The rights of the *Ego*, so far from exhausting existence, are not even self-vindi-

<sup>1</sup> *Ante*, pp. 208, 209.

<sup>2</sup> *Ante*, p. 209.

<sup>3</sup> Vol. i. pp. 294, 295, and vol. ii. p. 251, Saisset's ed.

<sup>4</sup> *Proleg.*, sec. 6.

cating, for the voluntary aid of other created existences is one of the conditions which nature has imposed on their exercise. The principles of the selfish system itself thus furnish us with the grounds for repudiating its conclusions. The rights of the *Ego* are an adequate guarantee for the rights of the *non-Ego*.

But objective rights stand, nevertheless, upon a separate correlative basis of objective powers. If the recognition of rights be inseparable from the recognition of life in our own case, and if the objective validity of this subjective asseveration be guaranteed to us by the analogy of organic existence as a whole, then surely the recognition of our neighbour's life involves the necessary and involuntary recognition of his rights. To recognize human life, and then to deny to it characteristics or qualities which belong to, and indeed constitute life in general, would be to involve ourselves in contradiction.

The only question that remains then is, Have we a neighbour? or, in other words, are there external existences at all? Into the metaphysical or physiological discussions as to the manner in which we became cognizant of the *non-Ego*, and the character in which it presents itself to our knowledge, whether material and physical, or immaterial and dynamical, or both, the jurist, as such, is not called upon to enter. That there are other existences than my own is a fact which, to my mind, is sufficiently proclaimed by the consciousness of my own existence *as separate*, for separation involves the existence of both the objects separated. The doctrine that the simultaneous knowledge of opposites is necessary, appears to

me to admit of as little question as that the simultaneous knowledge of contradictories is impossible; and to the extent of holding that consciousness gives us our knowledge of the object in the same act in which it gives us our knowledge of the subject, I am a "Natural Realist."<sup>1</sup> But be this as it may—external existence is a fact, at the practical recognition of which all minds arrive by some process; and such being the case, it is a fact which, in a treatise on jurisprudence, I shall take the liberty to assume. The assumption of this fact then, our previous conclusions being sound, is one which, as I have said, carries the whole of our subjective rights over to the objective side; for every right which was inseparable from my life necessarily clings to the life of my neighbour. My recognition of objective rights is thus dictated, neither by a sense of my own interests nor by a voluntary tenderness for those of others, neither by the hopes and fears of Hobbes, nor by the benevolence of Hutcheson. It is founded on no contract, either verbal or tacit, upon no law which man has made, for its roots are in a nature of which we all were passive recipients, and over the constitution and primary characteristics of which none of us has or can have the slightest control.

Lastly, the proportion which we found to subsist between subjective rights and powers, necessarily passes over along with them to the objective side. The equality which my neighbour can righteously demand, or which I can righteously concede to him, is an equality, not of powers and rights, but of their recognition.<sup>2</sup> I must accept him as I conceive that God has

<sup>1</sup> Hamilton's *Metaph.* Müller on *Sin*, vol. i. p. 80.

<sup>2</sup> See this subject fully discussed, Book ii. chaps. iii. and iv.

made him, and as life has developed him, and not as either he or I think he ought to be, or ought to have been. It by no means follows, however, that the estimate which I form of his qualities is an accurate one. If his nature be deeper and richer than mine, I am in danger of involuntarily doing him injustice; if it be shallower and poorer, I shall probably deceive myself and lavish on him, or her,<sup>1</sup> a degree of tenderness of which he, or she, is not worthy.

4. *Nature reveals objective duties, or duties by others to us, which exactly correspond to our subjective duties, or duties by us to others.*

The truth of this proposition follows from the preceding as a matter of course, for, on the same grounds on which our rights become our neighbour's, his rights must become ours. It is this revelation which constitutes our warrant for the enforcement of our rights, the necessity of such enforcement for their vindication having been ascertained, for all unnecessary exercise of force is a waste of power, whether it be by the baton or the sword, and nature abhors waste as she abhors a vacuum—which, indeed, is a waste of space.

Viewed as efforts for the benefit, direct or indirect, temporal or spiritual, of those against whom they are apparently directed, and whose immediate freedom it is their object to constrain, both the laws of war and criminal laws find their justification and their measure in the objective rights of which we treated in the last section.

5. *The existence of subjective and objective rights and duties,*

<sup>1</sup> *Adam Bede*, p. 308.

*and of their mutual dependence, constitute the sole revelation which nature makes to us with reference to human relations.*

As the *Ego* and *non-Ego* exhaust the sphere of being, so, in like manner, the rights and duties of the *Ego* and *non-Ego* exhaust the sphere of justice. And as the *Ego* and *non-Ego* are inseparable ontologically, so likewise are rights and duties linked together by the necessities of our ethical nature. It is as this nexus, or necessary interdependence, and not as any separate and independent principle of our nature, that we must understand the *οἰκείωσις* of the Stoics, on which the system of Grotius is founded. Viewed as a general principle of society, it is a mere generalization of the intuitive and involuntary tendency which manifests itself in each individual mind, to extend to the object the rights of the subject. It is not a primary or separate fact of nature, but a natural law, evolved from the primary facts of nature by our reasoning faculties.<sup>1</sup> In this respect it very much resembles "conscience," viewed as the harmonious verdict of our general nature. Its popular meaning is obvious and important; but I fail to see its scientific necessity or value. Rousseau has seen and stated this view very clearly. "Meditating upon the first and most simple operations of the human mind, I believe myself to see there two principles anterior to reason, of which the one interests us in the liveliest manner in our own wellbeing and preservation, and the other inspires into us a natural repugnance to see a sensible being, above all, a being of our own race, perish or suffer. It is from the concurrence and combination which our mind is in a condition to

<sup>1</sup> *Infra*, cap. viii.



make of these two principles, without the necessity of introducing that of sociability, that all the rules of natural law appear to me to follow.”<sup>1</sup>

## CHAPTER VIII.

### HOW WE BECOME COGNIZANT OF LAW IN GENERAL.

1. *Natural laws are rational inferences from the facts of nature.*

In the preceding chapter we have seen that what consciousness directly reveals to us is not laws or principles, but powers and rights. In this, as in all other instances, our experience<sup>2</sup> of the particular precedes our recognition of the general, and we shall examine the dicta of nature in vain, not only for the positive or concrete laws by which separate communities ought to be governed, but even for those abstract laws which assign the necessary conditions of human wellbeing and progress. The *summum cuique* of the Romans, for example, is an abstract or natural law so universal in its application as not

<sup>1</sup> *Discours sur l'origine et les fondements de l'inégalité*, preface, p. 50. It is in such occasional utterances that we see what might have come of Rousseau had he been favoured by education and circumstances. As Cicero said of Socrates that he was the Homer of Philosophers (*Tuscul.*, quæst. i. 32), so we may say of Rousseau that he was the Burns of Publicists.

I here and elsewhere use the word “experience” as implying the recognition of internal equally with external phenomena. The facts of consciousness are facts of experience, just as much as the facts of touch or taste.

to be confined even to human relations. In this respect it differs widely from any special or positive law by which the *sum* is defined and the *cuique* individualized—from such a law, we shall say, as that the *patria potestas* (the *sum*) belongs to the grandfather, if alive (the *cuique*). But the abstract *law* is no more revealed to us by consciousness than the concrete *law*. On the contrary, all that nature teaches us directly is, first, that we ourselves, and, second, that the other organized existences of which we are cognizant, possess individual powers, with correspondent individual rights. From these data, by the aid of our reasoning faculties, we infer the general law that “right corresponds to power.”

2. *Natural laws are necessary inferences from the facts of nature.*

We have seen that the ascription to the object of the rights of which the subject is conscious is an involuntary act, and that in each individual case our knowledge of our rights and our knowledge of our duties rest on the same basis of nature.<sup>1</sup> But this act is only the first step in a process of induction, every subsequent step of which possesses the same involuntary character. The moment that an objective existence is recognized, the recognition of rights proportioned to his powers, more or less clearly apprehended, is forced upon us. In addition to powers and rights, the relation which subsists between them thus forms part of the phenomena presented by our cognitive to our discursive faculties, and as the latter must accept the data which they receive, the only imaginable alternative lies between reasoning out these separate cognitions

<sup>1</sup> *Aut.*, p. 242.

into corresponding laws, and not reasoning at all. But the latter alternative, happily, does not lie within our reach, for the option of reasoning is no more given to man than the option of being. He may cease to reason, it is true, if he may cease to be; but even on the improbable hypothesis of self-annihilation being possible to him, he can no more avoid having reasoned than he can avoid having been. To this extent, and no further, as it seems to me, our knowledge of natural law may be said to be intuitive. We cannot wholly ignore our neighbours' rights. A being who could do so would not be a man. But each man will recognize them more and more as he becomes more and more of a man,—becomes, as we say, more “humane.” Nay, further, there will be more to recognize—for rights and obligations, as we shall see, keep pace with each other, and the obligations of a civilized man are greater than those of a barbarian. Whether his power of recognizing them does more than grow in proportion to the growth of the rights to be recognized, is a question which I shall leave for your own consideration.

Our knowledge of the laws of nature, if less immediate, is thus as inevitable as our knowledge of the facts of nature, and the character of these laws is as independent of our volition as the character of the facts of which they are generalizations. And these remarks apply to the laws which govern the abnormal as well as to those which govern the normal relations of human beings, whether as individuals, as citizens, or as political communities,—to criminal laws and to the laws of neutrality and war just as much as to the laws of status, of contract, or of international recognition. Sin and folly, however in-

explicable may be their origin, are facts of our nature the existence of which that nature reveals, and for which, in determining their true character, relatively at all events, she suggests appropriate laws. The only distinction between the laws which govern normal jural relations and abnormal jural relations which concerns us here, is that the object of the former is the protection and perpetuation of the relations which they govern, whereas the object of the latter is the annihilation of the relations which they govern.

3. *Natural laws determine the ultimate objects of positive laws, and fix the principles of jurisprudence as a whole.*

From our previous discussions it has resulted that nature assigns the realization of her own ideal in each genus, species, and individual (which ideal in the case of humanity is the Divine image which humanity reflects) as the object (τέλος) of her being. What we call life in time, is the process by which the idea of that which lives is revealed to it, and realized by it. Life, nature, like the divine, of which they are manifestations, thus embrace their own ends, are ends to themselves.<sup>1</sup> This ideal or object must consequently be the final object of all laws, whether abstract or concrete. But what we call natural or abstract laws are a statement of the necessary, and, as such, invariable conditions of the attainment of this object.<sup>2</sup> These conditions, then, which nature

<sup>1</sup> "By an idea," says Coleridge, "I mean that conception of a thing which is given by the knowledge of its ultimate aim."—*Church and State*, p. 10. If the thing be fully conscious, its idea and its ultimate aim will be identical, and their identification will progress as it advances in consciousness.

<sup>2</sup> I cannot go along with Coleridge (*ut sup.*, p. 12) in identifying laws with the idea, though he has, no doubt, Platonic authority for doing so.

prescribes to life as a whole, are necessarily binding upon life in its partial manifestations. The laws of nature thus fix the permanent conditions, or, as they are popularly but somewhat vaguely called, the principles of positive law, in all its departments, and assign to it its necessary character.

The principles of jurisprudence, or abstract laws, find their realization in wider and in narrower spheres: and it is for this reason, and not from any substantial diversity in the principles themselves, that they are divided into natural laws, or principles in the abstract; principles of legislation (*i.e.*, the framing of positive laws); and principles of jurisdiction (*i.e.*, the applying of positive laws to special cases). The first are the necessary conditions of life in accordance with nature generally; the second, the necessary conditions of life in accordance with nature in a special community, or between special communities for a special time; and the third, the necessary conditions of individual life in accordance with nature, in the like circumstances of time and place.

As the laws of nature, or general principles of jurisprudence, hold to legislation or law-giving precisely the same relation that legislation holds to jurisdiction or the administration of the law, it will be obvious that for men to arrogate to themselves, or others to confide to them, the duties of legislation whilst they are ignorant of the laws of nature, would be just as absurd in itself, and would be likely to be productive of far wider mischief than if men were to be raised to the bench who had no knowledge of the laws of their country. And yet the former occurrence is, I fear, far more frequent than the latter; for whilst positive law is studied in general with



infinite care, and nothing short of long and successful practice will satisfy us of the efficiency of our judges, almost any man is considered fit to be a legislator, and all men equally fit to choose one. In such circumstances, should we find enacted laws which are at variance with the principles of nature, or which realize these principles imperfectly, the fact is one which we may well deplore, but at which we cannot wonder. That the errors of our legislation do in practice arise from mistaken or imperfect conceptions of the ultimate objects which legislation ought to seek, quite as frequently as of the means—which in their turn of course become proximate objects—by which its ultimate objects are to be attained, is a fact which will become apparent more and more as we compare the objects of positive laws with the objects of natural laws; and there is, moreover, this very important difference between these two sources of error, that whereas a law which employs inadequate means calls only for amendment, a law which aims at a false object demands immediate repeal. The means, being temporary, may be adapted to the end; but the end, being permanent, cannot be adapted to the means. When the legislative engine is set on the right rails and turned in the right direction, all that is requisite is that the greatest amount of speed that is consistent with safety should be attained. But if it is on the wrong line, or has run off the rails, the journey will never be accomplished, and danger to life and property increases every instant that the engine continues in motion.<sup>1</sup> And these remarks apply *a fortiori* when

<sup>1</sup> “If the principle of a law be wrong,” says Burke, “the more perfect the law is made, the worse it becomes.”—*Tracts on the Popery Laws*, cap. iii. part i.

from the sphere of municipal we pass to that of international jurisprudence. The question, then, "what are the laws which nature assigns to our human relations," in addition to its lofty speculative interest, is the practical question which must take precedence of every other, because in this department of jurisprudence it is often undetermined, and it is on it that all other practical questions depend for their solution.

4. *The natural or de facto basis on which positive law rests being known, the positive law which governs any given human relation may be discovered.*

From what we have seen of the genesis of our rights and duties, we are now, I trust, in a condition to accept the three following propositions.

1st, The laws of nature are logical, and, as such, necessary inferences, which it belongs to the scientific jurist to make from the facts which consciousness or internal observation, and experience or external observation, reveal to him as the necessary conditions of human life.

2d, The laws of the nation, public and private, and the laws of nations, public and private, are similar inferences, which it belongs to the legislator or practical jurist to make ; (a) from the laws of nature, which he accepts as facts ; and (b) from the local and temporal facts or circumstances of the nation, or of the nations, which it is his business to ascertain.

3d, Judicial sentences, or judgments—*i.e.*, the laws of the individual case—are inferences, equally necessary, which it belongs to the judge to make ; (a) from the laws of the nation, or of the nations, which he accepts as facts in themselves, and, consequently, as decisive of the law of nature ; and (b)

from the facts—*i.e.*, the characteristics and circumstances of the individual—which it is his duty to ascertain.

There is probably no way in which the absolute and necessary character of positive law in all its branches, and the fact of jurisprudence being a science of nature, even in its minutest details, can be better illustrated than by remarking the close analogy which subsists between it and the sciences of external nature on the one hand, and the wide gulf which, on the other, separates both it and them from any system of rules logically deduced from premises which have been arbitrarily assumed. As an example of the latter, let us take the so-called science of heraldry. A witty writer, in reviewing a heraldic book, claimed for the “noble science” a foundation in nature, on the ground that “man is a blazoning animal.” But though the nature of man may impel him to blazon, it leaves him to blazon as he chooses, at least in so far as his actions are free at all. There might be fifty sciences of heraldry, each as good as the other, and this, not in different circumstances, but in circumstances absolutely identical. At any time it would be possible to put a sponge over such a “science,” and to construct another diametrically opposed to it in every particular, and yet not inferior to it in any respect. The second would be just as true to nature as the first, just as true absolutely, because neither of them would have any basis in nature, any absolute truth. The premises in both cases being entirely arbitrary, so arbitrary that they might have been determined by the casting of a die, if the rules were adhered to and the conclusions logically deduced, that is all that could be demanded in order to place them on a

footing of perfect equality. Both would be systems, neither would be sciences ; and in place of two such systems coinciding, it would be quite wonderful if they bore the slightest resemblance to each other, even if the circumstances out of which they arose exhibited the closest analogy. But with the sciences which have nature for their object, and with the arts which rest upon these sciences, the very reverse is the case. If the Chinese had a system of heraldry resembling ours, it would be as wonderful as if we were accidentally to fall on the letters of their alphabet, and the marks on their tea-chests, or if we were to find them playing our game of whist. But if the Chinese had a science of geometry different from ours, it would be no science at all. If they measured the earth by it, their measurements would be incorrect. If they built houses in accordance with it, they would tumble down. And so of their chemistry, of their physiology, and their psychology, at least to the extent to which the bodies and souls of Chinamen resemble those of other human beings. Now it is the same with their jurisprudence. Their positive law differs from ours, no doubt, very widely in its special provisions ; but these differences arise wholly from two causes—viz., (*a*) Error or imperfection in their conceptions of natural law, or in ours—for though natural law be infallible, all human interpretations of it are subject to many errors ; and (*b*) difference of circumstances, which necessarily varies the means by which the same principles, or natural laws, are realizable in different places or at different times. Still, there are certain invariable conditions of human life, such as the relations and the limits of power, and, consequently, of

right, the necessity of mutual aid, the relations of the sexes, &c., which communicate certain features of resemblance even to the positive rules by which the laws of nature are realized in different countries and different ages. Such laws, in short, differ in proportion to the extent to which they are the result of differences of original genius, or of stages of intellectual and moral development in the people, or of climate and other conditions of inanimate nature; they approximate in proportion to the extent to which these circumstances are assimilated. Were the genius and the circumstances of two nations the same in all respects, and their laws perfectly adapted to them, these laws would be identical in their minutest details. It is a profound saying of Kant,<sup>1</sup> though not, as we shall see hereafter, consistent with the distinction between perfect and imperfect obligations which he has adopted, that "there can no more be two decisions in the same case than there can be two straight lines between the same two points." As we can only have a right line, and a crooked one, so we can only have a right decision and a wrong one; whereas, a case which has no decision is as inconceivable as two points between which no straight line can be drawn, or as a circle which has no centre. It is an elevating thought on entering on the practice of our profession, that there is thus no case that can be presented to us so humble or insignificant that it may not be so decided as that we shall be entitled to say, with Kepler, that we have "thought God's thoughts after Him."

5. *Though necessarily existent and discoverable, positive laws never have been, and probably never will be, perfectly discovered.*

<sup>1</sup> *Metaphysic of Ethics*, Semple's trans., p. 222.



The truth of this proposition results only too plainly from the existence of that disturbing and bewildering element, which in our moral nature we recognize as sin, and in our intellectual nature as imperfection. Why we cannot discover a perfect law, even when we seem to possess all the elements of knowledge and reason, or obey a perfect law when we seem to be conscious both of freedom and of will, is as great a mystery as, but not a greater mystery than, why we cannot draw a perfect line or describe a perfect circle, though we know, and can demonstrate, the conditions of perfection in both. But the impossibility of discovering, or of obeying, perfect laws, is no greater argument against making principle the guide of our practice, and bringing positive as nearly as possible into conformity with natural law, than the impossibility of making perfect lines or circles would be an argument against making our straight lines the shortest distance we can discover between the points they are intended to unite, or all the radii of our circles as equal as we can. We cannot tell how near it may consist with the scheme of the Divine government that either the individual, or the race, should, in this life, approximate to completeness, either of knowledge or of obedience. But our ignorance, in this respect, need cause no irresolution to beings whose nature does not cease to remind them of the rule of life in its broader aspects, or set limits to the extent to which they may trace out and conform to its minuter prescriptions. The law of action and reaction, of which our extravagant and one-sided tendencies, and our consequent reformations, and revolutions, and reform-bills, and party strifes, and party victories, are humiliating and

degrading manifestations, is, to all appearance, just as inseparable from national life, as transgression and repentance are from individual life. History holds out no hope that the upward progress of humanity will ever be otherwise than intermittent and indirect. But if there be any lesson of encouragement that history teaches at all, it seems to be that the experience which men purchase at so fearful a cost is never wholly lost by them, as a race. The ultimate identity of knowing and being asserts itself more and more. Though the tendency to act on half-truths never disappears, the opposite reasons begin to tell sooner, and reaction takes place at an earlier period, at each successive stage of the life of a progressive people; and even where an individual nation has run so far into excess as to render its continued advance, or even existence impossible, its fate is more readily recognized as a warning, and its story as a contribution to that slowly accumulating mass of recognized truth and realized knowledge which is power and progress.

## CHAPTER IX.

OF THE LAWS OF NATURE, OR PRINCIPLES OF JURISPRUDENCE  
WHICH RESULT FROM THE HUMAN RIGHTS AND DUTIES  
WHICH NATURE REVEALS AS FACTS.

(a) *All human laws are declaratory.*

The first great principle of jurisprudence, and that to which it owes at once its sacred and its scientific character,

is determined by the necessity under which we have seen that our nature lies to accept itself as right and to seek its own realization.<sup>1</sup> I cannot state it better than in the golden maxim of the greatest of our own statesmen, which I have adopted as a motto to this work.

The passage, as a whole, is so instructive that I shall quote it at length. "It would be hard," says Burke, "to point out any error more truly subversive of all the order and beauty, of all the peace and happiness of human society, than the position that any body of men have a right to make what laws they please; or that laws can derive any authority whatever from their institution merely, and independent of the quality of their subject-matter. . . . *All human laws are, properly speaking, only declaratory.* They may alter the mode and application, but have no power over the substance of original justice."<sup>2</sup> To the same effect, and with almost equal felicity, Lord Bacon has said, that the rule points to the law, as the compass points to the pole, but does not make it. "Regula enim legem (ut acus nautica polos) indicat, non statuit."—*De Justitia Universali*, Aphor. lxxxv.

As laws are inferences from powers and rights,<sup>3</sup> existing in wider or narrower spheres, it is obvious that powers and rights cannot owe their origin to laws. We have seen that out of the original powers and rights which God bestows on His creatures, new powers and consequent rights may be generated, and new relations evoked, by their free activity. In this sense there may be new natural laws. These new

<sup>1</sup> *Ante*, p. 60.

<sup>2</sup> *Tracts on the Popery Laws*, cap. iii. part i.

<sup>3</sup> *Ante*, pp. 245-248.

powers and rights may assume the form either of increased personal capabilities of action, or of increased dominion over external objects, and the latter more especially may be transmitted and inherited.<sup>1</sup> On the other hand, a process of retrogression may have been in operation, and the individual or the community may have dwindled,—may have become less of an individual or less of a community than at a previous period. The relations which formerly subsisted between them will be limited, and they will generate less natural law. In either case, and in all similar cases, it is obvious from the necessary relation between power and right, that at each step, whether of progress or retrogression, existing powers are the sources of existing rights, that they measure their extent, and assign the limits of their recognition, whether that recognition be effected internationally by treaty, nationally by statute, or individually by judicial sentence.

Keeping this fundamental principle in view, you will at once perceive the absurdity of the popular belief—of the prevalence of which even in professional minds<sup>2</sup> too many in-

<sup>1</sup> *Ante*, pp. 230, 233.

<sup>2</sup> Wheaton, *History*, pp. 99, 100, 104, 105; Philimore, vol. i. p. 21, and Manifesto of Great Britain to Russia in 1780, which he quotes. In such cases it is always difficult to distinguish between loose writing and erroneous thinking; but the former in the author is too likely to become the latter in the reader. Even Grotius is by no means so careful as could be wished. As an instance, take the concluding sentence of sect. 40 of the *Prolegomena* to the *de Jure Belli et Pacis*. In that passage he speaks of a kind of law “Quod ex certis principiis certâ argumentatione deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate libera ortum habeat.” The only hypothesis on which this passage is reconcilable with the general principle that all positive law is necessary and declaratory, is, that Grotius is here speaking of mere enacted law which has failed to realize the law of nature. But that such is not his meaning is plain from the fact that he says the law of which he is speaking is of a kind that is *ubique ob-*

stances might be given—that rights may be “conferred,” “constituted,” “modified,” “limited,” “adapted,” and even “altered” by law. Formally, or rather nominally, of course, the thing may be done; because anything however absurd may be enacted. But the effect of such an enactment is not to change rights, but to outrage them; not to declare new truths, but to proclaim falsehoods. The νόμῳ καλὸν νόμῳ

*servatum*. In stating, then, that there is a species of purely voluntary law, originating *ex voluntate libera*, which is *ubique observatum*, and which rests on no certain principles, and in speaking of this *jus voluntarium* in other passages—e.g., i. i. ix. 2, and i. i. xiii.—this great man has not only forgotten, for the moment, the natural basis of jurisprudence, but has contradicted his own doctrine, as set forth in sects. 12, 15, 16, 17, of the *Prolegomena* and elsewhere. Voluntary law, in this sense, would not be the “grandchild” (sect 16), but the bastard of natural law. In the main, fundamentally and substantially, the system of Grotius is both sound and consistent; but in studying him we must be actuated by the sentiment with which he himself approached Aristotle: “Nobis propositum est Aristotelem magnificere, sed cum ea libertate quam ipse sibi in suos magistros, veri studio, indulsit.”—*Proleg.*, sect. 45. A similar charge of inaccuracy of expression, though not of thought, might be brought against Leibnitz, who frequently speaks of *Jus Voluntarium*. There is one sense, indeed, in which, without positive inaccuracy, law may thus be spoken of in a popular way. We have seen above that new laws may be generated by new facts or circumstances, and these facts or circumstances may, no doubt, arise from the voluntary activity or inactivity of mankind. But it is not the laws, but the circumstances which determine the forms of their manifestation, which are under human control. The circumstances being given—the relations being formed—a marriage, for example, being contracted—the laws which govern, and when enunciated define the relations, are as inevitable as the laws of physical nature, of logic, or of numbers. The points between which the straight line, to which Kant happily likened law, may, within the limits to which man’s free activity extends, be changed indefinitely, but, whatever position they assume, and whether they be visible or invisible, the straight line which unites them will always be inevitable. We may draw a crooked line, of course, or as many crooked lines as we choose; and in like manner there is no limit to the number of so-called positive laws which we may enact. But there can be but one positive law, in the sense of a law which realizes the natural law of the relation; and positive law is thus as little *voluntary* as natural law.



κακόν is an aspiration not only after the unjust, but the impossible.

The inflexible and universal character of the *de facto* principle, as it is called in international law, will be best illustrated by bringing it in contact with special relations, and mentioning a few of the directions in which legislation, by attempting to set it at defiance, has caused an antagonism between enacted and true positive law.

(b) *Law cannot change the character, or alter the relations of persons.*

We cannot advance or retard the progress of human life or reason by simple enactment—*e.g.*, we cannot make men majors or minors, or give them or deprive them of contracting or legislating power; all that we can do is to discover and declare the fact of its existence or non-existence in the special sphere with which we deal. We cannot resolve all relationships into fraternity, in order to fit them in with a predetermined political theory; neither can we raise relationships of affinity to the rank of relationships of consanguinity, in order to conform to theological traditions.

(c) *Law cannot constitute, extend, or circumscribe a proprietary relation.*

That possession is “nine points of the law,” or, in other words, that it constitutes the *prima facie* title to possess, is a maxim common to popular speech and to every department of positive law.

The object which the thief has stolen is presumed to be his till previous possession has been established by another, to whom the presumption of property is then transferred.

The intruder can only be ejected by a previous possessor, whose title the law declares to be preferable.

The law of prescription, by which questions of previous title are excluded, is even a stronger illustration of the *de facto* origin, and consequent declaratory character, of jurisprudence, inasmuch as it rests on the presumption, that after a limited time, no other proof of property can be equal to actual possession.

In like manner, in public international law, *de facto* existence as a state is the ground of *de jure* recognition, whilst in unappropriated territories actual possession and use must precede a claim to exclusive title as against future occupants. We have seen that paper titles, such as the Papal Bulls of other times, are now repudiated as violations of natural right, on the ground that they are destitute of the fundamental element of fact on which right reposes. Even partial occupation, such as that of savage and semi-civilized nations, is held to confer an exclusive right only to such portions of territory as are actually occupied industrially, and not simply wandered over, or occasionally resorted to as hunting-ground or pasture. It is on the same ground that paper blockades have been repudiated by neutral states.<sup>1</sup>

Such are a few of the most obvious, though not by any means the most indisputable instances of the declaratory character which belongs to all true legislation, and to all real positive law. It is by a more consistent adherence to, and a more extensive application of, the *de facto* principle alone that legislative progress is possible; and there are few legislative

<sup>1</sup> "Solemn Declaration" of Paris, April 16, 1856.

difficulties to which we cannot, by its means, perceive the possibility at least of a theoretical solution. I have spoken elsewhere<sup>1</sup> of its applications to international legislation, by the abandonment of the two errors of permanence and equality. Let us here<sup>2</sup> revert to the most delicate of all questions of internal legislation—viz., Whether any, and if any, what limits may justly be set to the accumulation and retention of private property?

The principle that there is no right which does not arise from, and continue to depend upon, power, and consequently that law cannot carry a proprietary relation beyond the bounds of its possible exercise, which decides this question in the case of the savage, is equally sound, though of far more difficult application, in the case of the civilized man. That alone can be *declared* to be his which *is* his, and that alone *is* his which he *has made*, and *continues to make*, his. Law deals with the actual, not the hypothetical. It has nothing to do with “may-be’s” or “might-have-been’s;” and as law can neither increase nor diminish the faculties which God has given to the individual man, or which he has developed, so neither can it assert or vindicate for him rights which are in excess of these faculties, and which he cannot exercise. To create rights is as impossible as to create the individual in whom they inhere, to add a cubit to his stature, or to raise

<sup>1</sup> *Transactions of the Royal Society of Edinburgh*, vol. xxiv. 1867: “On the application of the Principle of relative or proportional Equality to International Organization.” *Revue de Droit International*, 1871, No. I.: “Proposition d’un Congrès international, basé sur le principe de facto;” and 1877, No. II.: “Le Problème final du Droit International.”

<sup>2</sup> *Ante*, p. 215 *et seq.*

him from the dead; and to declare rights in excess of his faculties is simply to declare what is not. But the powers and faculties both of individuals and communities increase as civilization advances, or rather, civilization consists in the increase which takes place in these powers and faculties by means of their exercise. A civilized community, or a cultivated man, is thus in a condition to use and enjoy objects, which in the hands of undeveloped communities, or individuals, are mere useless tools. The powers of action and capacities of enjoyment and suffering of the latter are mainly physical; whereas those of the former, without ceasing to be physical, are in a still greater degree spiritual, arising from the intellect, the imagination, and the taste. These additional powers and capacities are, in reality, new elements of life, and they become additional sources of rights over external objects, which it is the function of legislation to ascertain, to declare, to vindicate. Within the same community, the rights of those who are more or less gifted by nature and developed by education, stand in precisely the same relation to each other, in kind, as the rights of the superior and inferior, or of the civilized and savage races of mankind. Even if the same means of culture could be placed within the reach of all, men's powers of availing themselves of it differ so widely, that, relatively at least, the barbarian, like "the poor," we shall "have with us always." It must not be forgotten, however, that the opportunity of energizing rationally depends, proximately, not on the possession of wealth, but of leisure (*σχολή*); and that if the possession of means in proportion to powers gives leisure, the possession of means in excess of powers

takes leisure away. A millionaire, unless his position or character be very exceptional, is a *βάνανος* in the true Aristotelian sense, almost as inevitably as a pauper.<sup>1</sup>

This, then, being so, whenever the external means and appliances of energizing in accordance with nature, in the case of individuals, of classes, or of communities, are at variance with their powers and capacities of so energizing, they are wronged, and legislative action is called for to bring right into conformity with fact, and positive into harmony with natural law. And to the extent to which the facts can be measured, the rights may be defined. The special rights being dependent on the special—*i.e.*, the local and temporal facts—and variable with them, can never, of course, find expression in any general or permanent formula. But when the general rights of humanity, of which the *de facto* principle is the expression, are brought in contact, not with the local and temporal, but with the general and permanent facts of humanity, the following general principles stand out for the guidance of legislation.

(1.) All men being equally men, and as such capable of energizing humanly—*i.e.*, of using and enjoying the means of human existence—are equally entitled to use and enjoy them.

But the means of existing humanly, we have seen,<sup>2</sup> include the means of developing humanly. This principle consequently brings compulsory taxation for the support and education of the poor within the sphere of justice, and to this extent limits the exclusive rights of property.

(2.) All men not being equal men, are not capable of ener-

<sup>1</sup> *Polit.*, vii. cxiii.

<sup>2</sup> *Ante*, p. 222.



gizing equally—*i.e.*, of using and enjoying the means of human existence to the same extent; all men, consequently, are not entitled to the same means of energizing, and a legislative enactment which should attempt to bring about an equal distribution of means would sin against nature by wasting her gifts in two directions.

(a) It would deprive those whose powers were above the average of humanity of means which they were capable of using for the common benefit, and would thus cause a waste of power.

(b) It would confer on those whose powers were below the average of humanity means which they were incapable of using, and would cause a waste of means.

Natural law, then, which is the ideal of economy as well as of justice, demands that a proportionate relation shall be maintained between means and powers.

(3.) No man being more than a man, and man's powers both of action and enjoyment, even when developed to the utmost, being confined within very narrow limits, his right to the means of energizing are necessarily limited both in extent and in duration.

There can, I think, be no question that this latter principle warrants legislative interposition to prevent the indefinite accumulation of property, and more especially landed property, in the hands of single individuals. This may be effected in various ways, *e.g.*—

1st, By enforcing the partition, though not, as a rule, the equal partition, of property amongst the children of the family. The *de facto* principle by no means forbids either a law of

primogeniture, or the legal preference of males to females ; but it brings both within the scope of the principle of preserving the proportion between rights and powers. We cannot accumulate the whole powers of a family in a single son, or merge the powers of women in the powers of men ; so neither can we accumulate or merge their rights. But as the presumption of fact is in favour of the powers of the eldest son exceeding those of his younger brothers at the period of the father's death, and of those of the brothers exceeding those of their sisters, it is in accordance with the *de facto* principle that the law of intestate succession, at all events, which must proceed on such assumptions, should prefer them. The extent of the preference is a question of fact for which natural law offers, of course, no solution ; and its silence seems to point unmistakably to the admission of some measure of paternal discretion. That, whether exercised by the parent or the state, this preference ought to be greater in rude and warlike than in civilized and peaceful times is obvious ; but resting, as it does to some extent, on permanent facts of age and sex, it ought never to be wholly abolished by positive law.

2d, In the absence of children, the creation of unlimited legal rights may be obviated by a compulsory distribution amongst collaterals, or by the adoption of the Crown, or the public, as joint heir with any individual favoured by the deceased, as is already partially done by our graduated scale of legacy-duties.

The practical difficulties which stand in the way of even an approximate estimate of the amount of means which may be really possessed and employed by a single individual, for the purposes of human life, are so great as in general to have dis-

couraged modern legislators from attempting to realize a principle, an inconsiderate application of which would lead to many of the evils which in former times attended those sumptuary laws, the object of which was to prevent waste in the direction not of accumulation, but of expenditure. If we reflect, however, on the marvellous rapidity with which wealth accumulates after it has passed the bounds of possible enjoyment, and the tendency which it has to become a burden and a snare to its nominal possessor, and a source of corruption to the society which it ought to fertilize, we shall see the advantage which might arise from the embodiment in actual legislation of the principle of the subjective limitation of rights.<sup>1</sup> That legislation from the subjective side, which should define the rights of the possessor, would be infinitely less dangerous than legislation from the objective side, which should declare the apparent rights or interests of others, is plain enough. Absolute spoliation could scarcely occur. Still the task of framing such an enactment is too delicate to render it probable that it will ever be satisfactorily performed. The tendency of a democratic legislature unquestionably would be to take cognizance all but exclusively of mere physical powers, and thus to bring about an equalization of wealth which would deprive the spiritual life, first of individuals, and then of the community, of all means of support.<sup>2</sup> No

<sup>1</sup> Aristotle was quite familiar with the notion of wealth being limited from the subjective side. He points out that ἀληθινὸς πλοῦτος is that only which contributes to the completeness of human life (ἀγαθὴν ζῶην).—*Polit.*, i. iii. i. 15.

<sup>2</sup> The almost total indifference of the legislature of this country to the interests of the higher educational institutions, which we owe to our forefathers, is already an indication of this tendency.

one is more sensible than I am of the danger of "society becoming top-heavy with unbounded wealth at the top, and discontent, poverty, and comparative barbarism at the bottom."<sup>1</sup> But I shrink from most of the remedies which are proposed for what I acknowledge to be an evil. Like so many principles of natural law, the principle which limits the accumulation of means to physical and spiritual powers of enjoyment, though it may be enforced, is one which will be far more easily and safely realized by men in their individual and domestic, than in their citizen capacity. In this sense the task is one which is almost wholly in the hands of the class whose ultimate interests call manifestly for its performance; and private action, even at the sacrifice of a few cherished traditions, ought not therefore to be hopeless. No substantial loss of physical enjoyment or social consideration would, I believe, be demanded by a voluntary redistribution of wealth which would remove all force from the argument that a waste of means resulted from the accumulation of property; whilst by increasing the numbers of the cultivated classes, a really trustworthy barrier would be erected against those barbarian influences from within,—that "republic from below," as the Spaniards call it,—which at the present time endanger the upward progress of humanity far more seriously than any barbarian aggression from without, and against which the weapons of mere physical warfare offer no protection whatever. I fully admit the difficulties which cling to all questions of degree; but still, if we take a few extreme instances, we shall see that even these difficulties, like other things, have their

<sup>1</sup> Review in *Glasgow Herald*, July 25, 1871.

limits. There are bounds beyond which they cease altogether, and these bounds may be rendered more definite by careful study of the circumstances in which we seek to impose them.

When Mr Hole, in his beautiful *Book about Roses*,<sup>1</sup> says: "Trop n'est pas assez; and if I had Nottinghamshire full of roses, I should desire Derbyshire for a budding-ground,"—we can see that he is speaking as a rose-maniac fully conscious of his infirmity, and we are as little led astray by him as by Beau Brummell when he said that, "with strict economy, a young gentleman might dress himself for a thousand a-year." But such illustrations prove only that there are limits to what may be rationally desired, or sanely expended, by reducing the opposite proposition *ad absurdum*. Let us try whether we cannot come somewhat nearer to the point at which use ceases and waste begins, and thus turn the utilitarian principle to its true use—that, namely, of guiding us to the means by which natural law is realized.

A man, for example, in addition to providing for the requirements of his position, as a man and a citizen, may purchase an estate of moderate dimensions, for the gratification of his taste and the indulgence of his pleasure. If no vested rights oppose him, he may even clear it of its inhabitants, and turn it into a park or a deer-forest, because these are forms in which he, or his friends, or his heirs, may be presumed to be capable of really enjoying it and exercising the rights of property over it. But Nimrod himself would have no claim to depopulate even so small a country as Scotland or Switzerland for sporting purposes; and if a modern millionaire were to absorb a single

<sup>1</sup> P. 62.



county or a single canton for his pleasure, or indeed under any plea of occupancy, and attempt to give it permanently the character of a single possession, he would certainly evoke feelings, and probably provoke measures of a kind which would be very prejudicial to the cultivated classes, and ultimately to civilization. When we pass limits which, though they cannot be absolutely, may be relatively defined, the earth can be no more appropriated than the air or the sea. It then becomes a *res publica*, and any attempt to establish rights of property over it will be scorned as a failure, and resented as an injustice. The plea that a valid title has been given, or that a money value has been paid, will go for nothing, because that cannot be conveyed which cannot be held, and the commodity is one the value of which can be measured only by incommutable personal services of ownership, which are impossible. The plea of prescription will be equally unavailing, because prescription is essentially an allegation of the continuance of such services; and that cannot be continued which never began. The imperfection of our knowledge may entitle us after a time to presume the existence of what may have been, but there can be no presumption in favour of what certainly was not. We may presume that a man was stronger or swifter than we can prove him to have been—nay, than we can prove any man to have been; but we cannot presume that he was stronger than a horse, or swifter than a bird. We may presume that he is alive 100 years after his birth, but not that he is alive 200 years after his birth.

The *de facto* principle thus assigns temporal, just as it assigns local, limits to rights of property. After the lapse of

a few centuries, or even generations, permanency, when applied to human rights, becomes almost as unmeaning a word as infinitude. We transmit to our descendants, or to those whom we adopt in their stead, the conditions of physical and spiritual life and development on the same title on which we transmit life itself.<sup>1</sup> But our descendants will be lost in the crowd of humanity that is to come after us, as our ancestors have been lost in the crowd of humanity that went before us. The longest posterity, like the longest pedigree, will have its limits, and when these limits are reached, the basis of fact, on which the right of transmission rested, will be lost. The right, consequently, must be held to be non-existent, or rather to be transmuted into some new right in harmony with the new fact which has been generated. In declaring the existence of this new relation between right and fact, there is manifestly no interference whatever with the original right of property, because that right, in its original form, has already perished. Here, as in the former case of the limitation of rights in point of extent, questions of fact of the most delicate kind remain for the solution of the practical legislator; but the abstract formula of legislation plainly is this—

*So long as, and to the full extent to which, the facts on which rights of property formerly rested remain unchanged, these rights are inviolable; but no longer, and no farther.*

The right which A transferred to B not being an absolute and unlimited, but a relative, conditional, and limited right, B's right will cease, or change its character, when the condition fails, or the limit is reached.

<sup>1</sup> *Ante*, p. 215 *et seq.*

Of temporal limitations of rights arising out of the *de facto* principle, we have numerous examples in positive legislation.

When rights of property are limited or resumed, as is said, for public purposes—*e.g.*, for the construction of a railway—the true theory of the transaction is, not that the individual has been deprived by law of a portion of what belonged to him, but that his right was all along limited or conditioned by the necessity of enjoying it as a member of the community, and that it can be so enjoyed now only under the additional burden, or new condition, which the law declares. From the first it held *in gremio*, so to speak, a contingent subjective limitation which has now emerged, and which has its counterpart in an objective right on the part of the community to enforce a sale for public purposes.

Precisely on the same principle, charitable and educational endowments are modified by the Legislature. When they cease to fulfil their object, the rights which centre in them have no longer the basis of fact on which they originally rested. An endowment for the benefit of slaves, or for the support of an Established Church, becomes inoperative on the abolition of slavery or the disestablishment of the Church. But in such cases the Legislature is by no means entitled simply to confiscate the property and apply it to the ordinary uses of the State. It must look not to the immediate, but to the ultimate object which the testator or benefactor had in view, and this it will effect by ascertaining the new facts and the consequent rights which have arisen, and vindicating the latter by new arrangements. The Protestant Church of Ireland was established, and many bequests were made to it for

objects which were not found to be attainable by its means. These bequests were thus in the position of legacies, with conditions attached to them which had proved to be impossible. That fact being ascertained—if it was ascertained—and Parliament having declared the Church itself to have ceased to exist as an Establishment—that being one of the conditions of its existence, which was henceforth inconsistent with the attainment of its ultimate object—future rights which would have continued to spring from its existence as an Establishment were declared to be no longer emergent in their original forms. The rights of present incumbents, on the other hand, were sustained, on the ground that the conditions on which they accepted their offices remained unaltered. The only respect in which the recent disestablishment of the Protestant Church of Ireland differed from the dismemberment of the Roman Catholic Church at the Reformation was, that the establishment of the Irish Church was held to have been an error, or an act of injustice from the first,—the facts never having warranted the rights which had been legislatively affirmed, and the institution having rested on enacted, and not on natural positive law.<sup>1</sup> But

<sup>1</sup> Our Edinburgh hospitals, in this respect, were in the same position as the Established Church of Ireland. They never fulfilled the professed objects of their founders—that, viz., of bringing up the children of poor parents to be thrifty, industrious, and self-helping citizens. Had their founders anticipated that they would be nurseries of future, as well as asylums for present paupers, it is to be presumed they would not have founded them. To make arrangements then by which their bequests could otherwise benefit the poor was clearly to carry out their wills. The case would be different if it were proposed to disestablish the Church of England, or the Presbyterian Church of Scotland. The plea would then be that of “*tempora mutantur, nos et (those whom they once benefited) mutantur in illis.*”

the effect of the two measures on private bequests was precisely similar. The Reformation rendered half the founders' wills in Oxford obsolete, and Christianity must have swept away those of the pious donors of heathendom still more extensively. Rights, the validity of which had been recognized for ages, were repudiated on the ground, not that they were bad originally, but that they would have been bad had the circumstances of society been what they had become. The same effect would have been followed had the donors or the founders lived; for no endowment by a living man would now entitle him to have masses said for his soul by the Fellows of an Oxford college, or a temple of Venus built alongside of a Free kirk. In saying this, I am far from seeking to justify the spoliation of what Mr Coleridge has called the "nationality," and the application of this common property to the material, in place of the spiritual uses of the community, which took place at the Reformation.<sup>1</sup> That was a diversion of it not from its immediate but its ultimate object, that object remaining as valuable and as attainable as ever, though not precisely by the same means. Men had not ceased to have souls, nor had their higher secular interests ceased to demand aid which they can never receive from popular sympathy. I am quite of Coleridge's opinion that the civilization of Europe received a check at the Reformation from which it has never recovered. But when we come to consider, not the end to be attained, or the means of attaining it as a whole, but the special application of the means and the rights thence

<sup>1</sup> I hope it is not being repeated in Ireland now, and will not be repeated in Belgium, as there is little doubt that it has been in France and Italy and Spain.



arising to individuals or classes, the case comes to be analogous to that in which a change has taken place in the value of money. The powers on which the rights were founded were then measured by the money which the testator willed should be paid for them. But if the money which was then a fair price for them no longer measures their value,—if it has risen, to force the buyer to give it, or, if it has fallen, to force the present possessors of the commodities, supposing them to exist, to accept it, would not be to vindicate the rights of the buyer, but to invade those of the seller, or *vice versa*. This remark suggests another illustration of the *de facto* basis, and consequently of the declaratory character of law.

(d) *Law cannot change the price of any commodity.*

Political economy first became a science when it was acknowledged to be a statement, not of the ingenious devices of men, but of the laws by which nature, independently of human contrivance, regulates the relations of trade, or, in other words, of the acquisition and transference of wealth; and it is to the frankness with which political economists have accepted, and the fidelity with which they have acted on the declaratory or *de facto* principle, to which all true scientific inquirers owe allegiance, that we are indebted for the superiority of the departments of our practical jurisprudence which fall within its sphere, over those by which the relations of the citizen, and even the status of the individual are governed. Whilst we have been “making” political and social laws, we have been contented to discover the laws of trade, and the consequence has been that, whereas in the one direction the necessity of unmaking what experience had repudiated has absorbed

more than half our energies, and there is still the widest divergence between the laws of different communities even where their circumstances are the same, in the other a system has been developed which has met with so wide an acceptance as to have brought mankind almost to the condition of a single family. But mercantile legislation had not always the guidance of this monitor; and in former times nothing was more common than to fix the prices of commodities, including labour, by law. The price of a commodity is the right to the commodity valued in money, or, in other words, the pecuniary measure of the right. Now it is plain that a law which declares the right of the possessor to be measured by the price he can get for it, or, in other words, gives him an action for whatever he can establish to be the value of his commodity, gives him his due (his *sum*), and determines his natural relation to others with reference to that object. But if a nominal price be set on it, or a right in it be "constituted by law," different from its market value, a wrong is done, either to the possessor and possible seller of the commodity, or to the rest of the community. If the price assigned to it be below its market value, the possessor is robbed of the difference; if it be above the market value, a monopoly to the extent of the difference is created in his favour. But in neither case is the real value of the commodity changed, or the right of its possessor, of which its value is the measure, affected by the arbitrary price which has been fixed by the law. Such a law, it is true, may be enforced, or what is far more easy, the parties defrauded by it may be punished for its evasion. But it can no more become a law, in the

genuine sense in which alone positive laws find their warrant in nature, and take their place in the science of jurisprudence, than the arbitrary price can become the real price, in accordance with the science of political economy. To put it on a footing of equality with a law which declares that the seller shall have the real value of his commodity, on the ground that it has been enacted by a competent authority from some fancied motive of expediency, is to separate law from justice altogether, and to fall back again on the old fallacy of the νόμος καλὸν νόμος κακόν.

All legislative errors are not equally absurd, and a law fixing a price for a commodity at variance with its real value, or declaring all men to be equal, at variance with the facts both of nature and society, is not so manifestly ridiculous as a law declaring that sweet shall be bitter,<sup>1</sup> that black shall be white. But all laws which set the facts of nature and the arrangements of Providence, with their legitimate consequences, at defiance, are equally at variance with the principles of the science of jurisprudence, and for this simple reason that the object of that science is not to redistribute God's gifts according to any principle, either just or unjust, but to discover and to recognize the distribution which He has made. What I have here said, of course, does not invalidate the right of the State, in the public interest, to determine the real value of a commodity—*e.g.*, of land required for public purposes, and to fix the price which shall be paid for it to its possessor, as the measure of that value. Moreover, inasmuch as in an organized community the opinion of the individual must give

<sup>1</sup> The νόμος γλυκὺν νόμος πικρόν of Democritus.

way to the opinion of the State, and the will of the individual must give way to the will of the State, the real value of a commodity is that which the State, through its constituted organ, shall ascertain and declare to be the market value for the time being. Any personal sacrifice of feeling which the transaction may impose on the individual, is merely the price which he pays for the privileges of citizenship.

## CHAPTER X.

### OF THE RELATION BETWEEN LEGISLATION AND JURISDICTION.

*The function of the judge, as such, is limited to the interpretation and application of written or of consuetudinary law.*

Though I have been careful and anxious to bring out the importance of the distinction which, when seen in the light of the science of jurisprudence, or with a view to legislation, exists between a positive law and a mere arbitrary enactment, I hope no one will impute to me any such opinion as that the citizen is entitled to disobey, or that the judge is emancipated from enforcing an enactment, by what may appear to either of them to be its imperfection, or even its absurdity. The fact that it has been enacted, or is recognized by their sovereign, whether that sovereign be an individual or a community, renders it a positive law to the one *quâ citizen*, and the other *quâ judge*, because the citizen existence of the one, and the judicial existence of the other, rests on the hypothesis that their sovereign is a true interpreter of the law of nature in

the circumstances of that community. It is this hypothesis which gives validity to the jurisdiction of the judge on the one hand, and on the other places every suitor who asks his judgment virtually in the position of the people of Israel when they came to Moses "to inquire of God."<sup>1</sup> The law of the land is the major premiss, so to speak, of every judgment which is pronounced; and the judge would not only act illegally but illogically, if, in defiance of it, he either exercised his private judgment, or arrogated to himself the functions of the Legislature.

But whilst his duty, as the official representative of the sovereign will, is clear beyond all dispute, it is needless to deny that cases may, and do occasionally occur, not only to the judge, but to the citizen, in which the duty of the individual gives rise to most painful hesitation. Ought the judge to administer, or the citizen to obey, a positive law which the one or the other believes to be at variance with the law of nature and the will of God? or ought not rather each of them to relinquish by anticipation, the one the office, and the other the allegiance, which he knows may impose on him such a duty. To all generous minds the affirmative answer will at once suggest itself. Clearly, it will be said, no man ought to obey, far less to administer, a law which he believes to be wrong. But as a warning against hasty conclusions, even in the right direction, just consider what would be the consequences of such a rule if it were rigorously applied to the relations of any mere man, however good and wise, and any actual, or, I fear, any possible community of human beings. Human judgments, being fallible, are diverse, not accidentally

<sup>1</sup> Exod. xviii. 15.



but necessarily. That the citizen or judge should sometimes, as an individual, dissent from the ruling voice of his countrymen, is therefore inevitable ; and if on the occurrence of every such difference of opinion, however trifling, he thought it necessary for conscience' sake that he should vindicate his own views, or even decline to accept theirs, the woolsack would be converted into a bed of thorns, and human society would be impossible. We should have but one social phenomenon to contemplate, and that a phenomenon with which we in Scotland are but too well acquainted,—a perpetual hiving-off of minorities—one never-ending “Disruption.” Now a “Disruption,” be it remembered, is in principle a revolution, and the right of revolution is a right which can scarcely emerge in a constitutional State, or be asserted by a Christian citizen. It is his duty to turn his other cheek to the law that has smitten him, till he can procure its constitutional repeal. He who cannot accept martyrdom in *that* form, is at best a “martyr by mistake.” He may throw away his worldly comfort and wellbeing, but he can scarcely claim to have done it “for conscience' sake.” It is clearly of the nature of every community, whether lay or ecclesiastical, that it should set certain limits to the right of private judgment of its members ; nor will these limits be so difficult to assign, in the particular instance, as may at first appear, if, on the one side and the other, it be kept in mind that their object is not the restriction, but the greatest possible extension of the borders of liberty to all. To pursue this subject further would bring us on ground which we must tread hereafter,<sup>1</sup>

<sup>1</sup> *Infra*, Book iii. cap. iii.

and for the present I shall content myself with referring to the remarks of Dr Lushington, Dean of the Arches, in the famous case of *Williams v. Bishop of Salisbury*.<sup>1</sup>

The nearest approach to legislation which is permitted to the judge consists in the dispensation of what is called "equity," by which, in its original though scarcely in its later English technical sense, he is understood to modify the letter of the law to the extent of enabling him to apply its spirit—*i.e.*, to administer justice in circumstances which were unforeseen when it was enacted. We must guard, however, against the error of supposing that in dispensing equity the judge dispenses justice of a different kind from that on which law reposes. There is but one kind of justice; and legal justice and equity, as we shall see hereafter,<sup>2</sup> are identical. Something different from law, in the sense of common or statutory law, he, no doubt, does dispense. But the whole object of his departing from law is to enable him to adhere to justice, and this not justice in any special sense, not justice of a "higher and finer kind,"<sup>3</sup> as Aristotle, or Eudemus, somewhat misleadingly tells us, but the ordinary justice of the case, which the law as it stands has failed to embrace. He extemporizes, so to speak, an exceptional law (*repentinum edictum*) to meet the exigencies of exceptional circumstances (*prout res incidit*). In the possibility of the occurrence of cases calling for so irregular a use of the judicial office, or resulting in a legitimate conflict between enacted law and the most recent discoveries of physical science or theological

<sup>1</sup> Morris, P. C. Cases, 375.

<sup>2</sup> Cap. xi. xii.

<sup>3</sup> Grant, *Arist.*, vol. v. c. 10, note p. 139.

learning and thought, we behold the extreme importance of such a constant revision of our statute-books, lay and ecclesiastical, as shall at all times preserve the harmony between their provisions and the prevailing beliefs of the existing generation. It is very far, however, from indicating that the binding force of erroneous law, whilst unrepealed, arises, as Mr Austin supposed, from some other ultimate source than natural law. Up to the moment that an enacted law is repealed, it enjoys the presumption that it is *not* erroneous, —in other words, it continues to be the interpretation of the law of nature which the community has authorized; and it is surprising that Mr Austin should not have seen that it was to this still unbroken link which binds it to the source of all law, the fountain of all legislation, that its authority is due.<sup>1</sup>

## CHAPTER XI.

OF THE HISTORY OF THE DISTINCTION BETWEEN PERFECT AND IMPERFECT OBLIGATIONS; AND ITS EFFECT IN GIVING RISE TO THE NEGATIVE SCHOOL OF JURISPRUDENCE.

I do not propose here to enter into any analysis of the idea of duty beyond what I formerly said of it, that it is a

<sup>1</sup> Austin, vol. i. p. 234. This is only one of many objections which I might urge to a book and to a system, which, more than any other, have received acceptance in England. But in the case of one whose character I esteem so highly as I do Mr Austin's, I gladly avoid polemics, and in all cases, indeed, I prefer the constructive to the destructive process. Unless I can put another system

dictum of consciousness which results inevitably from the recognition of an objective existence, similar to that subjective existence in which we have already recognized rights. The question with which we are here concerned is simply whether there be two separate kinds of duty, one of which having corresponding rights, admits of being enforced by external means; and the other of which, having no corresponding rights, does not admit of being so enforced.

(a) *Rights and duties being throughout reciprocal and co-extensive, there is no distinction, in principle—i.e., in nature—between one class of obligations and another.*

Our previous inquiries<sup>1</sup> led us to the result that the duty of affording mutual aid infers, in every case, a corresponding right to claim such aid, and that the rights and duties which bind human beings to each other are throughout reciprocal and co-extensive.

It will readily be perceived that this doctrine is inconsistent with the distinction by which rights on the one hand, and duties and obligations on the other, have been divided into two classes, called perfect and imperfect, of which the first are said to possess, and the second to want, those inherent qualities which warrant the use of force to secure their fulfilment. Let us inquire into the character of this distinction, and of the arguments by which it has been maintained.

in its stead, I am not entitled to pull down Mr Austin's. If I succeed in doing so, it will give way of its own accord, and I shall be spared the pain of saying words that might seem disrespectful, and the inconvenience of crowding my pages with quotations which I believe to have no absolute value.

<sup>1</sup> *Ante*, p. 204 *et seq.*

The distinction, as we shall see immediately, has been variously stated by different schools of jurists and moralists, but under all the modifications of it which do not amount to entire repudiation, it means essentially what I have stated; and of all the stumbling-blocks with which pedantry has encumbered our science, I think it is that which has proved most fatal to its progress.

It is true that there is a meaning which is sometimes attached to this distinction by practical lawyers, to which, as it has no scientific significance, there can be no theoretical objection, except this, that not being the meaning which was assigned to it by any of the theoretical writers from whom the practitioners ignorantly adopted it, its use is perplexing, and is only a confused and roundabout way of getting at a distinction which is perfectly plain, if simple men would be contented with simple words. In the sense to which I refer, it merely asserts that there is one class of obligations which, at a given time and place, would, and another which, at the same time and place, would not, and ought not, to be accepted as good grounds of action in a court of law, without attempting to explain the reasons which led to the formation of the two classes. So stated, it amounts to nothing more than the distinction between positive and natural law, and in that sense, as I said, my only objection to it is that it is needless. But I object to it on far higher grounds when I hear it in the mouths of theoretical jurists, when I find it imported into natural law, and when obligations are ranged in virtue of it into two classes, differing not in degree but in kind, and that so essentially, as that one of them falls permanently without,



and another permanently within, an imaginary line which is supposed to mark off the sphere of ethics from that of jurisprudence. To say that some obligations are more important, or more sacred than others, would be merely to say that all the transactions of life are not of equal magnitude—a proposition too obvious to be supported by argument, even by Pufendorf.<sup>1</sup> Nor would it be less of a commonplace to assert that some of them, on the ground of their greater importance, are more frequently enforced, or because they have reference to external objects, may be enforced more readily than others. But to say that one half of them rests on a half dictum of conscience, and the other half on a whole dictum of conscience, that though the observance of all of them be right, there is one half of which the violation is not wrong, and that this half of them falls beyond the domain of justice—these are propositions which seem to me not only unsound in theory, but fraught with practical dangers of a more than ordinarily serious kind. It was of a system in which this distinction was carried out to its legitimate consequence of a complete separation between law and ethics, that Hugo

<sup>1</sup> But even in this respect obligations continually change places. In general it is a more sacred obligation that I should pay my debts than that I should go out to dinner. But suppose the debt is an omnibus-fare, and that the dinner is a feast of reconciliation. *Quid juris?* When Professor Calderwood says that there is an ethical use of the distinction, to which apparently he does not object, “that some duties are always binding, others only in certain circumstances,” I dissent on the ground that no duties can be exercised *in vacuo*, and consequently that they have no existence till some circumstances arise. Duty is essentially an objective conception, and could not exist in a solitary subject. The only conceivable solitary subject is the Creator, and to Him we have seen that the idea of duty does not apply even after creation, otherwise than as identical with His free will.

applied the epithet of a cut-throat code<sup>1</sup> (eine Todtschlag-moral), and I shall point out to you instances of its effects by-and-by, which will convince you that the expression did not go beyond the occasion. Yet so far is this error from being an exploded and innocuous one, that, at a period comparatively recent, it formed, even in Germany, the basis of the prevailing doctrines of scientific jurisprudence, and the only ones which ever largely influenced the thought of this country; whilst, with little knowledge of its history, and less perception of its consequences, it is still adopted and retailed by our latest writers, and not unfrequently acted on by our statesmen and legislators. It is in virtue of it that a recent writer of great ability<sup>2</sup> has asserted that, in passing from the doctrine of recognition to that of intervention, we betake ourselves to a "high and summary procedure, which may sometimes snatch a remedy beyond the reach of law," of which "its essence is its illegality and its justification its success;" and it is in obedience to it that, shrinking from "the fluctuating and trackless depths of policy," in which this writer finds no guiding principle at all, our newspapers have advocated and our Government has adopted the cowardly and heartless doctrine that we may blamelessly withhold our aid from nations struggling with oppression, even on the assumption that it is in our power to afford it without counterbalancing loss, or even danger, to ourselves.<sup>3</sup>

<sup>1</sup> Tennemann, p. 361.

<sup>2</sup> Historicus (Sir W. Vernon-Harcourt) on *International Law*, p. 41.

<sup>3</sup> When these lines were written (1872), the direction in which this false distinction acted on our external policy was generally that of producing an exaggerated notion of neutrality. Neutrality was regarded as a line of conduct which a

(b) *The attempt to distinguish between perfect and imperfect obligations was not unknown to antiquity.*

I cannot agree with Warnkönig, or with his authorities, when he states<sup>1</sup> that neither amongst the Greeks nor Romans are any indications to be found of the distinction in question, and that it was Thomasius who, in 1705, for the first time divided ethics into two portions—viz., morals and natural law, the first embracing those imperfect duties which cannot consistently with justice, and the second those perfect duties which must consistently with justice, be enforced. On the contrary, I believe, that like most theoretical distinctions which admit of many practical applications, and offer many convenient compromises, it was early suggested by foregone conclusions which it served to justify; and that thus, in substance at least, it has a place in the history of speculation in every age and country. As regards classical antiquity, at all events,

State was always morally *entitled* to adopt, if it chose, whatever the circumstances of the case might be, and the adoption of which was universally to be commended. Now (1880) it acts, with equal force, exactly in the opposite direction—viz., as a defence for intervention confessedly at variance with the ordinary rules of morality. *Punch*, at once the wisest and the wittiest of our periodicals, in his number for January 24, 1880, p. 29, comments, *more suo*, on an almost incredible specimen of this latter aberration on the part of the *Pall Mall Gazette*. Many similar, though more guarded utterances, might be quoted from other party organs, and from the *Times* within the last two years. Now, do people who write such passages really suppose that there are two distinct codes of morality, one of which embraces the golden rule, and the other of which does not; and that the former ought to govern men in their national, and the latter in their international relations? If so, can they wonder if thieves and swindlers should avail themselves of so convenient a distinction in defining the relations in which they stand to honest men? The general election, which has just occurred, will probably convince them that the people of England, at all events, have no intention of separating either their politics or their patriotism from morality.

<sup>1</sup> *Delinatio*, p. 6.

it is not only distinctly traceable in the later stoical distinction between the *καθῆκον* and the *κατόρθωμα*,<sup>1</sup> but we find that Socrates regarded it as part of the prevalent teaching of his time, and that it was his strong sense of the evils which resulted from the sophistical habit of subordinating the virtues to each other, and thus withdrawing from them severally the sacred character which could not be refused to them as a whole, that led him to contend so keenly for their unity, and the ultimate identification of each with all, and of all with each.

Then look at the middle ages. Asceticism, in so far as it aimed only at self-discipline on the one hand, or at a severer training for the service of God and man on the other, rested alike on objective and subjective conceptions of duty; for every man is bound, in duty to God and his fellow-creatures, as well as to himself, to use the talents that have been committed to him, and he can claim no merit, if, in order to render them available, he has to fortify by external appliances a will which he recognizes to be free. But when ascetic practices came to be regarded as works of supererogation—when it came to be thought that God's favour could be secured by them, just in proportion to the extent to which they transcended the bounds of duty,—then, as of old, the virtues came to be referred to separate principles, and an order of them was imagined to which no rights corresponded, and the obligation

<sup>1</sup> Grant's *Aristotle*, vol. i. p. 262. Zeller's *Stoics*, p. 271. Sir Alexander Grant translates *καθῆκον*, suitable, and *κατόρθωμα*, right,—and this seems to be borne out by the passages which Zeller gives. Grant remarks, however, that *καθῆκον* came to be translated by the Latin word *officium*. It is on this ground, probably, that Calderwood (p. 38) has opposed *καθῆκον* to *καλόν*. It is rather equal to *καλόν*, and is translated by *officium* only when *officium medium* is meant.

to perform which was imperfect. It was on this distinction that a large part of the science of casuistry<sup>1</sup> rested, which differed from jurisprudence in this, that, whilst jurisprudence dealt with duties which, seen from the opposite point of view, became rights, casuistry was occupied mainly with the aptitudes, as they were called, or unilateral duties.<sup>2</sup>

Lastly, as regards the earlier masters of our own science in modern Europe:<sup>3</sup> the fact that the distinction is indicated by Suarez, and had found admission into such works as those of Grotius and Puffendorf, is proof enough that, though they had<sup>4</sup> no thought of pushing it to the negative consequences which it ultimately yielded, the idea of turning it to account as a means of defining the province of jurisprudence was not reserved for Thomasius in 1705, and still less for Mr Philips in 1864!<sup>5</sup>

(c) *It is generally ascribed to Thomasius.*

Whether justly or not, the distinction in question, when viewed as a doctrine defining the limits of the science of jurisprudence, is generally coupled with the name of Christian Thomasius, almost in the character of a discovery, a circumstance amongst others which proves, though we hear little of him now, that he was a man of first-rate importance in his

<sup>1</sup> It was in virtue of their admission of the ἀδιόφορα that the Stoics became the founders of casuistry.—Zeller's *Stoics*, pp. 218, 281. It is a curious coincidence that Seneca was a Spaniard by birth.

<sup>2</sup> Neander.

<sup>3</sup> The general position taken up by Thomas Aquinas excludes the distinction, see *infra*, cap. xii.; but see also the doubtful passage, vol. vi. p. 436.

<sup>4</sup> Gulielmi Grotii, *Enchiridion*, p. 121, where he no doubt speaks for his great brother, as well as for himself.

<sup>5</sup> Philips on *Jurisprudence*, Introd. pp. 5-7. Austin has the opposite view, vol. i. p. 20.



own day, and renders it desirable that I should preface my criticism of his system with some slight account of his personal character and position. Descended from a professorial family in Leipzig, his father was the still more and more justly celebrated Jacob Thomasius, the author of many valuable works on Philology and the History of Ancient and Scholastic Philosophy. Christian, the son, was born in 1655, and was educated under the eye of his father, who held a chair in the university; Leibnitz, the son of another professor, who through life expressed the greatest affection and reverence for the elder Thomasius, having been his pupil some years earlier.<sup>1</sup> Being naturally vain, and possessed with a mania for being thought original, Christian Thomasius early pushed himself into notice as a leader of the party of innovation, already in the ascendant. Safe in the armour of Bacon and Descartes, he attacked the scholastic philosophy, and attempted to turn Aristotle into ridicule by the poor device of translating selected passages from his writings, word for word, into German. With more reason, he protested against the use of Latin in the schools, and professed to deliver, in the language of common life, a philosophical system which should be intelligible to common understandings. It affords a curious illustration of the difficulty which attended the application of the modern languages to learned pursuits, that almost every one of Thomasius's graver works was written in Latin. But, whatever justice there may have been in the claims which Thomasius advanced to the character of an original thinker, there can be no doubt that he was a copious writer on all

<sup>1</sup> Leibnitz was born in 1646.

subjects connected with jurisprudence. So varied were his labours and acquirements, that Warnkönig goes the length of speaking of him as a modern Antistius Labeo, though, as regarded his opinions, one would have thought that of the *duo decora pacis*, he bore the stronger resemblance to Capito. In 1687 he commenced a monthly journal under the foolish title of *Freimüthige, lustige und ernsthafte, jedoch vernunft- und gesetzmässige Gedanken oder Monatgespräche über allerhand, vornehmlich aber neue Bücher* (outspoken, merry, sincere, yet rational and legitimate thoughts, or monthly talk, about all sorts of books, but especially new ones). The opposition which this publication excited, together with his adoption of German in his lectures, rendered him so unacceptable in Leipzig that he went to Berlin, and thence to Halle, under the patronage of the Brandenburg Court. He was honourably distinguished as the opponent of trial for witchcraft and punishment by torture. His character, though tasteless and shallow, was no doubt active and progressive. Of his influence in Germany, the University of Halle, which owes its origin to him, and to which, as its first rector, he stood in a relation similar to that in which Leibnitz stood to Berlin, is a sufficient monument. But in this country it is probable that the title of his work on natural law commended it to notice more than even the fame of its author. It is called *Fundamenta juris naturæ et gentium ex sensû communi deducta*; and Christian Thomasius, consequently, is one of the one hundred and six witnesses whose testimony Sir William Hamilton cites in proof of the universality of the philosophy of common-sense.<sup>1</sup> But

<sup>1</sup> Hamilton's *Reid*, p. 785.

whether it was to this circumstance or to deeper causes connected with the general tone of thinking which then prevailed that they owed the favour they enjoyed, the doctrines of Thomasius and his followers in jurisprudence and natural law were in high repute amongst our countrymen a hundred years ago. There is every reason to believe that it was from the writers of this school, probably from Thomasius himself, that Hutcheson, in particular, adopted the distinction between natural law and ethics; and the opinions of Hutcheson influenced those of his successors, both here and in England, very extensively. The doctrine, in the form in which Thomasius presents it, in so far as it had an immediate historical source, is said by Ahrens,<sup>1</sup> I think justly, to have sprung from a misapplication of the tripartite division of justice which his friend and contemporary Leibnitz had introduced a few years before, in a tract on the "Method of learning and teaching jurisprudence."<sup>2</sup> It was a juvenile production, and is not included in some editions of his works; but it acquired importance from the fact that he refers to it, and accepts the view of justice which it advocated, in the celebrated preface to his *Codex Diplomaticus Juris Gentium*<sup>3</sup> (quemadmodum rem adolescens olim in libello, de methodo juris, adumbravi).

Justice, Leibnitz taught, manifested itself in three degrees: (1) strict justice (*jus strictum*), which consists in commutative justice, and may be resumed in the principle *alium non ledere*; (2) equity (*æquitas*), or distributive justice, equivalent to the

<sup>1</sup> P. 553.

<sup>2</sup> *Nova Methodus discende docendæque Jurisprudentiæ.*

<sup>3</sup> *Dissertatio*, vol. i. sect. xii.

principle *suum cuique tribuere*; and (3) piety (*pictas*), or probity (*probitas*), enunciated in the maxim *honestè vivere*.<sup>1</sup>

I do not think that the Roman *Juris præcepta*<sup>2</sup> can be maintained, even as a division of degree, in any absolute sense. The first and the third branches are simply the second (*suum cuique*), exhibited in different points of view; for not to hurt our neighbour is neither more nor less than to give him his own, and the same is, I think, plainly the ultimate meaning of the *honestè vivere* also. On the principle, then, that things which are equal to the same thing are equal to one another, if the first branch and the third admit of being identified with the second, they are themselves identical; and the whole resolves itself into a series of distinctions without differences. Aristotle has said that an incapacity to draw nice and subtle distinctions is the characteristic intellectual defect of the vulgar.<sup>3</sup> With equal truth, perhaps, he might have stated the characteristic defect of the learned to consist in distinguishing too often and too much.

But, be this as it may, Leibnitz did not establish, or mean to establish, any absolute distinction between the *strictum jus* and the others, on ethical grounds. He is not contented with tracing all of them to an ethical source, as Professor Calderwood seems to be; on the contrary, he indicates, in the preface to the *Codex Diplomaticus*, a very clear opinion to the effect that the distinction between them is created by positive law, by the action of which alone an *aptitudo*, as he expresses it, is converted into a *facultas*. That such was Leibnitz's

<sup>1</sup> Ahrens, *ut sup.*

<sup>2</sup> *Inst.*, 1. 1. 3.

<sup>3</sup> Τὸ διορίξειν οὐκ ἔστι τῶν πολλῶν.—*Ethic. Nic.*, vol. x. 2.



view, is further proved by the fact that he elsewhere identifies justice with the "charity of the wise" (*Justitiam igitur, quæ virtus est hujus affectûs reatrix quem φιλανθρωπία Græci vocant, commodissimè, ni fallor, definiemus caritatem sapientis, hoc est, sequentem sapientiæ dictata*). As Leibnitz does not assert that there is a charity of the foolish (*caritas stulti*), differing from and transcending the charity of the wise, we may take the liberty of separating his general dictum that justice may be defined as charity, from his qualification (*sapientis*), which he probably introduced for no other reason than to guard against the popular abuse of speech, by which the name of charity is too often given to mere irrational sympathy, or it may be ostentatious profusion. It is on the ground of his thus asserting the absolute identity, in principle, between justice and charity—a subject of which I shall speak fully hereafter—that Ahrens, when treating of Leibnitz's views, says that "justice, according to him, does not concern the external relations of men alone, but extends as far as reason and the rational relations of men with all other beings."<sup>1</sup> How little sympathy Leibnitz had with any scheme for separating jurisprudence from ethics, becomes further apparent from an interesting passage in one of his letters, which is probably less known than those I have quoted. "Ethicæ," he says, "est docere virtutem, jurisprudentiæ hunc quem dixi usum ejus ostendere. . . . Opinio, quæ jus naturæ ad externa restringit, nec veteribus Philosophis, nec Jurisconsultis olim gravioribus placuit, donec Pufendorfius, vir parum Jurisconsultus et minimè Philosophus, quosdam seduxit: Est ejus non

<sup>1</sup> P. 553.



magna apud me auctoritas; quam ferè popularia tantum de suo adferat, et in cortice hæreat.”<sup>1</sup>

But if Thomasius cannot claim Leibnitz as a predecessor, he had many loyal and illustrious followers in Germany. Of these, the most devoted were perhaps Gerard and Gundling,<sup>2</sup> and certainly by far the most illustrious was Immanuel Kant. To Kant's influence, more than to any other cause, was probably due the unhesitating confidence with which, till a recent period, this distinction was generally maintained and applied. In Kant's hands, it is true, it assumed a somewhat different form—a form which admitted of its being more readily brought to the test of experience, and which, on that account, has led to its being absolutely rejected by a greater number of those who came in contact with it in Germany as expounded by Kant and his followers, than of those who still know it, as is the case in England, only as his predecessors had stated it. Like Thomasius, Kant held that there are two distinct classes of duties—those which may, and those which may not be enforced consistently with the dictates of natural law, and, of course, of positive law in its true and proper sense. The line by which these two classes of duties are divided, he believed to be absolute and permanent—not a line indicated by external circumstances, traced by particular systems of positive law, and varying with time and place; but a line drawn by the constitution of human nature, and the necessary relations of human society. So far, indeed, neither

<sup>1</sup> *Epistola*, vii. Leibnitz's position in this and other matters relating to jurisprudence may now be readily discovered from Professor Trendelenburg's *Kleine Schriften*, &c., ante, p. 32, note.

<sup>2</sup> Tennemann, p. 352.

Kant nor Thomasius stated anything that was new, but the teaching of Thomasius contained the germ of a principle which Kant worked out and applied, and which may, I think, be regarded as the distinctive feature of the Kantian school of natural law, as it unquestionably is that which distinguishes it from the school which is now fast gaining the ascendant in a speculative, as in so many directions it has already done in a practical point of view.<sup>1</sup> The principle to which I refer, is that which assigns negative rights and duties alone to justice as their source, whilst it holds all the positive rights and duties of humanity to be based on the *honestum* and *decorum*. Kant perceived that very little progress was made towards rendering the old distinction between perfect and imperfect obligations available for practical purposes, by asserting that the perfect obligations were enforceable, and that the imperfect obligations were not. To define a perfect obligation as one that was enforceable, and then an enforceable obligation as one that was perfect, was to reason in a circle, from which it was possible to escape only by the adoption of an external test by which either the one characteristic or the other could be positively determined. Now, such a test was afforded by the principle which I have mentioned—the principle, viz., of confining the sphere of justice to negative rights and duties; and though its application is correctly ascribed to Kant, there are passages in Thomasius which, I think, estab-

<sup>1</sup> The fact of Ahrens having been selected to write the article on Rechtsphilosophie in Holtzendorff's *Encyclopadia*, shows that he was regarded in 1873 as the leading representative of the subject in Germany. Trendelenburg, who agreed with him in this matter, held the same position amongst those who dealt with the subject from a philosophical point of view, as Ahrens did amongst jurists.

lish his claim to its discovery. In particular, let me refer to the passage where he says, "Præcepta negativa pertinent ad præcepta justî, præcepta affirmativa autem ad præcepta decori," &c.<sup>1</sup>

Adopting this principle, then, Kant taught that the obligation not to interfere with the liberty of our neighbour was the only perfect and enforceable obligation. All the positive duties which we owe to our neighbour he held that we owe him morally only—they are imperfect, non-enforceable obligations, and beyond the sphere of jurisprudence, forbidden to legislation, not accidentally or generally, but necessarily and invariably. It is not a little remarkable that so staunch an adherent of what the Utilitarians call the intuitive system as Kant, in this the almost solitary instance in which he allowed his opinion to be formed by what seemed the manifest teaching of experience, should have fallen into what, had he lived to our day, experience would probably have induced him to repudiate as an error. The following I believe to be pretty nearly the history of this occurrence. The curse of Kant's time was over-legislation. To what extent the philosophical doctrines, with which the Wolfian school was now opposing the negative teaching of Thomasius, is chargeable with the fact may be questioned; but the fact itself is certain. Trade, religion, social life and progress in all directions, were regulated and restricted. In Germany, Frederick the Great<sup>2</sup> and

<sup>1</sup> P. 213, ed. 1718.

<sup>2</sup> In his *Anti-Macchiavelli* Frederick indicates the points of difference and agreement between himself and the Italian. Unlike Macchiavelli, he puts the interests of the Prince, as an individual, altogether into the background; but he sacrifices his personal morality also to the interests of the State.

Joseph the Second were patriarchal monarchs, who, as Ahrens<sup>1</sup> has said, unhesitatingly put “le salut public audessus du droit et de la liberté des individus.” In his marvellous book on France before the Revolution, M. de Tocqueville has shown us that, in no small measure, it was the interference of the State, by means of intendants and other officials, with the liberties of the individual that brought about the French Revolution; and in its earlier stages, so long as it could be regarded as a protest in favour of liberty, Kant, like Burke and so many others who afterwards shrank in horror from its excesses, and turned in contempt from its exaggerations, was a zealous sympathizer with the movement. *In corruptissimâ republicâ plurimæ leges*, is the saying of one<sup>2</sup> who had lived through a still darker epoch; and the whole Liberal party in Europe, Kant being of the number, were so sensible of the fact that liberty had suffered before their eyes from the very science of Government of which it was the true object, more than from any other cause, that they sought to confine positive law within the narrowest limits. Their aim was to elaborate a system in accordance with which the State should become a mere police, which should never interfere with individual action except for the purpose of preventing interference; and in order to lay a theoretical groundwork for such a system, it was plainly necessary that the sphere of jurisprudence should be declared to be a purely negative sphere. Kant, as may readily be imagined, occupied himself chiefly with the theoretical groundwork, but that he aimed at the same practical end as his contemporaries, is plain enough; and if we wish to

<sup>1</sup> Ahrens, vol. ii. p. 20.

<sup>2</sup> Tacitus.



see the principles of his system worked out, not perhaps to the full results which they logically yield, but to those which it is probable Kant contemplated, we have only to turn to the pages of another illustrious German of the generation which immediately followed. In his work, entitled *Thoughts with a View to Determine the Limits of the Action of the State*,<sup>1</sup> Wilhelm von Humboldt sought to prove that the community, as such, was necessarily and permanently incapacitated from aiding the individual directly, and that the only influence which it could legitimately exercise over him was confined to prohibiting him from interfering with other individuals.

"The doctrine of Kant,"<sup>2</sup> as Ahrens has said, "completes the distinction established by Thomasius between morality and law; law, however, preserves an intimate relation with the good, because it exists only for the purpose of assuring the personality and the moral liberty of man. The school of Kant has often forgotten this relation in separating legal liberty, or the liberty which exists of right, both in civil and political arrangements, from moral liberty. But Kant himself had the fullest consciousness of the connection which exists between these two kinds of liberty, though he has not determined it with sufficient precision." Readers of Ahrens's own discussion<sup>3</sup> may perhaps be permitted to doubt whether the praise which he has bestowed on Kant in the last sentence be not pretty nearly all which he himself is entitled to claim. "Law and morals," he says finely, "lend each other mutual

<sup>1</sup> *Ideen zu einem Versuch die Grenzen der Wirksamkeit des Staats zu bestimmen.*

<sup>2</sup> P. 44.

<sup>3</sup> *Distinction et rapports entre le droit et la Morale*, vol. i. p. 159.



support ; separated or confounded, they produce social disorder, but, distinguished and united, they are the two most powerful levers of all real progress." The sin of separating them, of which Kant was unintentionally guilty, Ahrens certainly does not commit. He carries his opposition to the negative school so far, as, in my opinion, to fall back into the *perfidie te ipsum* of Wolff, and thus to lose the distinction between natural law and ethics altogether ; but perhaps I had better not accuse him of confounding them till I have submitted to the reader my own attempt to distinguish them.<sup>1</sup>

The difficulty which led Kant to adopt the distinction between negative and positive, in preference to that between perfect and imperfect obligations, had pressed itself on the better class of thinkers in our own country at an earlier period ; and whilst Rutherford states the old distinction without the slightest misgiving as to its serving the purpose of establishing a permanent and workable line of demarcation between law and ethics, Hutcheson, follower of Thomasius though he was, was far less confident.<sup>2</sup> In his first book (p. 68), indeed, he seems to lean to the Socratic view of justice by which the distinction, as we shall see presently, was excluded ; and in the second book, though he states it, he qualifies it thus : " Yet the boundaries between perfect and imperfect obligations are not always easily seen. There is a sort

<sup>1</sup> *Infra*, Book ii. cap. i.

<sup>2</sup> As in all similar cases, the more we look into the question, the less do we find it to be new. Here, for example, is a clear expression of opinion on the part of Thomas Aquinas in favour of the positive school : " Plus est operari bonum quam vitare malum. Et ideo in præceptis affirmativis virtute includuntur præcepta negativa."—*Summa, Secunda Secundæ*, quæst. 44, 3, 3.

of scale, or gradual ascent, through several almost insensible steps, from the lowest and weakest claims of humanity to those of higher and more sacred obligation, till we arrive at some imperfect rights so strong that they can scarce be distinguished from the perfect, according to the variety of bonds among mankind, and the various degrees of merit and claims upon each other. Any innocent person may have some claims upon us for certain offices of humanity. But our fellow-citizen, or neighbour, would have a stronger claim in the like case. A friend, a benefactor, a brother, or a parent, would have still a stronger claim, even in those things which we reckon matters of imperfect obligation."

The ground of hesitation which Hutcheson here indicates has reference, not to the form of the distinction as commonly stated in his time, but to its substance. He doubts if the duties of humanity can be identified with those which are imperfect, and as such non-enforceable; and hence we may probably infer that unless, like Kant, he had been carried away by the spirit of the rising generation, he would have pronounced the test of negative and positive to be illusory.

The relation in which Dr Reid stood to the prevailing doctrine is a still more curious illustration of the gradual manner in which the truth dawns even upon clear-sighted men. In the first place,<sup>1</sup> he states the distinction in the usual way, without any apparent hesitation as to its soundness; then, on the following page,<sup>2</sup> he says "that the two classes, like the colours in a prismatic image, run into each other, so that the best eye cannot fix the precise boundary

<sup>1</sup> Hamilton's *Reid*, p. 644.

<sup>2</sup> P. 645.

between them ;” and finally, he returns<sup>1</sup> to the ancient view, and admits charity, and, as a necessary consequence, all the other imperfect obligations, within the sphere of justice,—thus practically repudiating the distinction altogether.

Dugald Stewart, notwithstanding his vigorous and repeated protests against the manner in which natural law was taught by the civilians, in which I generally concur, does not seem to have freed his own mind from what was probably their greatest error ; for we find him admitting that “justice is the only branch of virtue in which there is always a right on the one hand, corresponding to an obligation on the other.”<sup>2</sup>

The first of our countrymen—and, so far as I know, the only English writer of importance even yet—who has consciously abandoned the distinction, and expressly separated himself from the prevailing doctrine, was Dr Thomas Brown. As, in doing so, he had the merit of having been one of the earliest modern thinkers in Europe to assert the universal character of ethics, and thereby to place the science of jurisprudence on what was its ancient, and what I hope before long will be universally recognized as its true basis, I shall quote the passage from his lectures in which he expresses his views. It occurs towards the end of Lect. 91.<sup>3</sup>

“I have treated,” he says, “of our moral duties with only few remarks on what are commonly denominated rights ; for this best of reasons, that the terms right and duty are, in the strictest sense, in morality at least, corresponding and commensurable. Whatever service it is my duty to do to any one, he has a moral right to receive from me. . . . I do not speak

<sup>1</sup> Pp. 658, 659.

<sup>2</sup> *Outlines*, p. 269.

<sup>3</sup> P. 615.

at present, it is to be remembered, of the additional force of law (that is, positive law) as applied to particular moral duties, a force which it may be expedient variously to extend or limit, but of the moral duties alone; and in these, alike in every case, the moral duty implies a moral right, and a moral right a moral duty. . . . The laws, indeed, have made a distinction of our duties, enforcing the performance of some of them, and not enforcing the performance of others; but this partial interference of law, useful as it is in the highest degree to the happiness of the world, does not alter the nature of the duties themselves, which, as resulting from the moral nature of man, preceded every legal institution. . . . On this very simple distinction of duties which the law enforces, and of those which for obvious reasons it does not attempt to enforce, and on this alone, as I conceive, is founded the division of perfect and imperfect rights, which is so favourite a division with writers in jurisprudence, and with those ethical writers whose systems, from the prevailing studies and habits of the time, were in a great measure vitiated by the technicalities of law. The very use of these terms, however, has unfortunately led to the belief that, in the rights themselves, as moral rights, there is a greater or less degree of perfection or moral incumbrance, when it is evident that morally there is no such distinction; or I may even say that if there were any such distinction, the rights which were legally perfect would be of less powerful moral force than rights which are legally said to be imperfect. There is no one I conceive who would not feel more remorse, a deeper sense of moral impropriety, in having suffered his benefactor, to whom he owed his affluence, to per-

ish in a prison for some petty debt, than if he had failed in the exact performance of some trifling conditions of a contract in terms which he knew well that the law would hold to be definite and of perfect obligation. It is highly important, therefore, for your clear views in ethics, that you should see distinctly the nature of this difference to which you must meet with innumerable allusions, and allusions that evince an obscurity, which could not have been felt but for the unfortunate ambiguity of the phrases employed to distinguish rights that are easily determinable by law, and therefore enforced by it, from rights which are founded on circumstances less easily determinable, and therefore not attempted to be enforced by legal authority." And he thus sums up his view: "All rights are morally perfect; because wherever there is a moral duty to another living being, there is a moral right in that other, and when there is no duty there is no right. There is as little an imperfect right, in a moral sense, as there is in logic an imperfect truth or falsehood."

This very clear exposition of the fallacy of the distinction between perfect and imperfect obligations, in any other sense than as a distinction between ethics, or natural law, on the one hand, and positive law on the other, was, as I have said, one of the earliest in Europe after the revival of what in antiquity had formed part of the teaching of the Sophists by Thomasius, and its application by Kant and his followers in the eighteenth century.

Brown lectured for the first time, as Dugald Stewart's assistant, in 1810; and his brilliant career was terminated by his too early death in 1820. The passage which I have



quoted must consequently have been written during the intervening ten years.

In Germany the fame of its original patrons protected the distinction from question for the better part of another decade. The first writer who is mentioned by Trendelenburg as professing the opposite doctrine is the now recognized father of the positive school, Karl Chr. Fr. Krause.<sup>1</sup> Then there are his two leading disciples—who have toiled at the dissemination of his doctrines, “mehr als ein Menschenalter hindurch”<sup>2</sup>—Röder,<sup>3</sup> whose *Politik* appeared in 1837, and Ahrens,<sup>4</sup> the first edition of whose work appeared in 1839. Stahl<sup>5</sup> in 1830, and Schleiermacher,<sup>6</sup> as was natural in one who was built on Plato, in 1835, adhered to the ancient doctrine from different points of view, though neither of them were of Krause’s school in other respects. Of later writers, Trendelenburg classes as adherents of what by that time was becoming the prevalent doctrine, Wirth in 1841, Chalybæus in 1850, and the younger Fichte in the same year, the elder Fichte having in this matter adhered to Kant. To these writers, Hegel, though differing from most of them very widely in other respects, falls in this respect to be added; and Trendelenburg himself, as by no means one of the least important—his work

<sup>1</sup> His lectures were published in full by Professor Röder in 1874: *Das System der Rechtsphilosophie; Vorlesungen*, &c. — Leipzig, Brockhaus. Hitherto Krause’s system had been known only from the *Abriss des Systemes der Philosophie des Rechts, oder des Naturrechts*, 1828.

<sup>2</sup> Röder’s *Krause, Vorbericht*, p. xii.

<sup>3</sup> *Naturrecht, oder Rechtsphilosophie*, 1860.

<sup>4</sup> *Cours de Droit Naturel ou de Philosophie du Droit*, 6th edit., 1868.

<sup>5</sup> *Philosophie des Rechts*.

<sup>6</sup> *Entwurf eines Systems der Sittenlehre*.

on Natural Law,<sup>1</sup> which appeared in 1860, having had for its express object to restore the connection between law and ethics, which the influence of the Kantian school had so seriously weakened. Warnkönig, who was an eclectic, and not very much of a philosopher, can scarcely be said to have taught a system of his own, but on this point he was a firm adherent to the same view. Amongst the various shades of opinion which he enumerates<sup>2</sup> he mentions that of a writer called Flatt, who carried his opposition to the limitations of the negative school so far as to maintain that there are no perfect obligations. Tennemann mentions more than one philosopher who rejoiced in this ominous cognomen. I am not myself acquainted with the work to which Warnkönig refers; but if all that the writer in question meant was that there are no obligations so perfect, morally, as not to require that, in some conditions of society, they should be made the subjects of positive law, I should be very much disposed to assent to his proposition, provided he could demonstrate the possibility of its practical application. There is surely no natural obligation so perfect as "Thou shalt not kill," and yet murder is forbidden by positive law in every Christian country. In the other direction there is nothing so trivial as not to be regulated by positive law of some kind. It is the law of our dinner-tables to present fish immediately after soup. In Germany there is a different law; but in both there is a positive law. If, then, we extend the term positive law, so

<sup>1</sup> *Naturrecht auf dem Grunde der Ethik*, 1860.

<sup>2</sup> *Philosophie Juris delineatio*, p. 26. His own views will be found in the doctrinal portion, p. 79.

as to include under it the rules of society and the regulations of religious bodies, and if we recognize opinion as one of its so-called sanctions, the number even of subjective obligations which fall within its scope will probably be found to be very much greater than we are accustomed to suppose.

But it is the followers of Krause who, not only by their writings but by their annual congresses and other proceedings, have made themselves the practical representatives and expositors of the positive school; and for this reason it may be desirable that I should state their views in somewhat greater detail. Their leading thought, more particularly as represented by Röder,<sup>1</sup> is guardianship (*Vormundschaft*). All legislative action, all government — which the Kantian school had identified with police — Röder (reminding one of Plato's φύλακες) resolves into guardianship, exercised by those who are majors over those who are minors, and having for its object, in the first instance, the benefit of the latter. I say that they give precedence to the interests of the minors; for one cannot but feel that the tendency of the whole class of writers to which Röder belongs is, theoretically, to repeat

<sup>1</sup> Professor Röder, whose recent death (20th December 1879) is an irreparable loss to science and to his friends, did me the honour to review this work in the *Tübinger Zeitschrift für die Gesamte Staatswissenschaft* for 1873 (ii. *Heft*, pp. 213-232) under the title of *Neure Rechtsphilosophie in England*. His generous and indulgent criticism finds many exceptions, more particularly, of course, at the points at which I have adhered to the Kantian system in preference to that of Krause. But he does not allege that I have misunderstood or misrepresented his general meaning even there; and with reference to one matter he pays me the compliment to say (p. 222) that I belong to the *sehr Wenigen* who have penetrated to the full sense! I consequently hope that with the slight alterations I have made on it, the statement of his doctrine in the text will be found to be fairly accurate.

what I have elsewhere pointed out as the error of the school of benevolence,<sup>1</sup> and to forget the existence of subjective rights altogether, whilst practically they would sacrifice the fraternal to the paternal principle, and fall back on absolutist doctrines of legislation. No such objections, however, necessarily attach to their system; for the interests of all being ultimately identical, in consulting the real interests of their wards the guardians really consult their own interests also, and *vice versa*. This thought then Röder adopts, quite legitimately, as expressing the principle of the positive school; and he follows it out in all possible directions, and finds for it all possible applications. It determines the true spheres of action and of passion, and fixes the limits of interference and non-interference in every department of jurisprudence; for interference shall take place when, and only when, it conduces to the benefit of the minor—*i. e.*, when it enables him, or tends to enable him, to attain the perfection of his being and the ends of his human existence. Wisely and considerably Röder professes to draw no absolute lines, either as regards public or private relations, between those whose duty it is to aid, and those whose privilege or misfortune it is to accept aid; and the sphere of guardianship thus always diminishes just in proportion to the extent to which its objects are accomplished. The minor, who is *majoritati proximus*, is not entitled to the full rights, or bound to undertake the whole responsibilities of a major; but he is no longer an infant, and must mainly trust to self-guidance and self-help. It is needless that I should point out the

<sup>1</sup> *Ante*, p. 208.

manner in which this principle, originating in the relations of parent and child, is extended to the other domestic relations, and even determines the conditions and limitations under which free contracting power must be recognized between third parties. But, in these times, I must not fail to call attention to the difference between the order of political ideas resulting from a system which, starting from the relation of parent and child, embraces the family relations in their integrity, and the ordinary democratic one, which, taking cognizance of the brotherly relation (*fraternité*) alone, degenerates, in the end, into individual isolation and collective anarchy. The watchword, or rather the war-cry of the democratic party is, "L'élimination de toutes les tutelles, le dégagement le plus complet possible de la personne humaine."<sup>1</sup> "Je ne reconnais d'autre souverain," exclaims M. Acolas, "pour moi-même que moi-même."<sup>2</sup> But what if I should be able to exercise the sovereignty only by the help of another? A sovereign may be a minor like other people. What if I should be a minor in age, in intelligence, in natural gifts? The greater number of grown men are savages, and are consequently in their minority; and there are very few of us, I fear, who are not more or less in the same position.

Applied to public law, the principle of guardianship not only binds the community into a single organism, but it supplies a rule for the gradual admission of the whole community to share the rights and responsibilities of self-government. It is thus liberal in the fullest and strictest sense. But it manifestly shuts out the notion of an equal participation in these

<sup>1</sup> Emile Acolas, *La République*, p. 8.

<sup>2</sup> P. 31.



rights and responsibilities, and in this respect is strongly anti-democratic. Professor Röder<sup>1</sup> is consequently an advocate for the principle of political graduation, which I have so long maintained, and a determined enemy to levelling (*Gleichmacherei*). Even a restricted suffrage, a suffrage which for the time being should shut out a large proportion of the community from all participation in government, he holds to be fully justified by his system, so long as power shall be thereby placed in the hands of those, and of those only, who can exert it better for the common good—who can act as guardians. The result is unquestionably legitimate,—at least I can see no ground on which it can be assailed, even though greater prominence were given to individual rights than Röder's system, in this aspect, would seem to allow them. But by a proper application of the principle of graduation, in the manner which I have elsewhere explained,<sup>2</sup> I think the limits of total exclusion might be restricted to a greater extent than Professor Röder and the class of writers to which he belongs, seem to have contemplated. It is plain, however, that this principle excludes all forms of government which have in view the exclusive interests either of an individual or of a class—absolute monarchy, oligarchy, and democracy,—together with those forms which, though affecting to be con-

<sup>1</sup> Such, at all events, is his general doctrine; but, like Ahrens, he has not always maintained it consistently, and at vol. ii. p. 141 of his *Naturrecht*, you will find a passage in which he asserts the equivalence of functions. On the other hand, in his *Politik* he goes very boldly in the opposite direction, and in the review above referred to explains and vindicates this passage in the *Naturrecht* on grounds which I confess I do not quite understand.

<sup>2</sup> *Political Progress not necessarily Democratic*, 1857; and *Constitutionalism of the Future*, 1865.

fided equally to all, are in reality exercised by a mere numerical majority; and these, on grounds which I shall explain more fully hereafter, I believe to be the only forms of government the realization of which will ultimately be found to be irreconcilable with order, progress, or even civilization.

The idea of guardianship has its application also in external politics,—the *jus inter gentes*. The principle of graduation introduces a new element into the doctrine of Recognition, and finds an appropriate function in the ranking of states for purposes of arbitration and intervention,<sup>1</sup> whilst it furnishes the ground, and I believe the only ground, on which the continued rule over a peaceable but semi-barbarous or retrograde nation—our own rule in India, for example—can be justified.<sup>2</sup> Seen from the side of the conquered people alone, however, the true view of the matter is that, so long and so far as external government by a higher or more advanced race does really promote the human development of the lower or retrograde race, that government is just. It is an interference in favour of liberty on the whole, and thus falls in with the object of Kant's system, to which we shall ultimately see grounds to give in our adhesion, though it conflicts with the negative character of his means, which, I believe, we must reject.<sup>3</sup> The moment that the lower or retrograde race becomes capable of attaining this end by its own efforts, the

<sup>1</sup> P. 261, note.

<sup>2</sup> That of the French in Algeria might perhaps stand on the opposite ground—viz., that, in suppressing a nest of pirates, they were asserting rights on the part of the trading nations of Europe not less real than any which the Algerians had to their guardianship.

<sup>3</sup> *Infra*, Book ii. cap. 1.

rule of the higher race, unless spontaneously retained, degenerates into tyranny.

But it is in the region of criminal law that Röder conceives his principle to be peculiarly fruitful, and he is never weary of dilating on the benefits of its practical application. The true object of punishment, he says, is neither vengeance nor terror, but the amendment of the criminal for his own benefit and the benefit of others, his resumption of the duties and restoration to the rights of a free man. It is not to increase evil in the world by extending to the transgressor the suffering he has inflicted on others, but to diminish the evil by converting the criminal's will, which, if it be a curse to his fellow-mortals, is a still greater curse to him. If our object were simply to torture him, we have only to let him alone. But it is in the fact that this object is one which we are not entitled to set before us, that punishment finds at once its reason and its justification. It is the medicine to the enfeebled and vitiated will, and the criminal has a right to it, just as those who are sick in body have to the apothecary's draught or the surgeon's knife, that the starving and impotent have to the soup, the foul to the soap, or the ignorant to the instruction that is doled out to them by the hand of voluntary or compulsory charity. The compulsion in all such cases, both in the case of him who gives and of him who receives the benefit, may be held to be illusory; for, even in the case of punishment, Röder would agree with Hegel in holding that by the conscious commission of crime the higher nature of man consents to punishment, and that all that is effected by the jury, or the judge, is to ascertain the fact of this consent, and

to assign the form and measure of its concrete realization. But no man is entitled finally to abandon himself, and consequently no man can be held to have consented to punishment which is not for his own ultimate benefit. On this ground Röder is an opponent of capital punishment, which he holds—somewhat hastily perhaps even with a view to this world—to cut the criminal off from the opportunity of amendment; and to all forms of corporal punishment, which he believes to degrade him. On the first of these difficult questions I do not wish to go beyond what I have already said.<sup>1</sup> But, as regards the second, it sometimes occurs to me that a little more experience of criminal courts might probably lead a good many philanthropists to ask themselves whether there be not human beings whom no corporal punishment could degrade, and to whose “sittliche Bildung” it might even contribute.<sup>2</sup> Nor is it inconceivable that the last penalty of the law, carried out after an adequate period for reflection and repentance, might conduce more to the human perfection of the criminal than the prolongation of his life; or that his removal from society would be more beneficial to others than any future career that would be possible to a nature so degraded. On the other hand, the theory of guardianship furnishes by far the most complete answer to the common objection to the employment of criminals in remunerative labour, on the ground that it interferes with the labour of honest men. If we regard the criminal in the light of a pupil, the brush-maker, or mat-

<sup>1</sup> *Ante*, p. 219.

<sup>2</sup> When acting as a magistrate, I have myself observed the vastly greater impression which a sentence of whipping produced on boys than a sentence of imprisonment with hard labour.

maker whose earnings are depressed by his enforced competition, has no more reason to complain than he would have if a neighbouring brush-maker or mat-maker compelled his idle young varlet of a son to work. The State is simply the parent who wields the rod; and the interests of the criminal are no more separated from those of the community than the interests of the rebellious child. But it is not *hujus loci* to discuss these matters farther, or to follow out the theory of guardianship into all the results which it is supposed by Professor Röder to yield within the sphere of positive law, civil or criminal. As regards the latter, more especially, we continually encounter his thoughts in every one of his works; and he has, besides, set them forth very fully in a separate treatise on the prevailing doctrines of crime and punishment.<sup>1</sup>

Having made these preliminary observations on the history and present position of opinion with reference to the distinction, the admission or rejection of which is now recognized as the touchstone by which the character of systems of jurisprudence and their relation to ethics must be tried, I must now endeavour to enter somewhat more closely into the grounds on which I hold that on this, as on so many other points,<sup>2</sup> we must return to what I believe always to have been the central creed of humanity, and accept, with the added light which Christianity affords, the teaching of the great thinkers of the heathen world. In doing so I shall take the subject up in the light in which the Greeks loved to discuss

<sup>1</sup> *Die herrschenden Grundlehren von Verbrechen und Strafe in ihren inneren Widersprüchen*, 1867.

<sup>2</sup> *Ante*, cap. iv. *passim*.



it, and endeavour to discover the true relations which subsist between the virtues, and more particularly between justice and charity—the highest types of the two orders into which the virtues have been distributed.

## CHAPTER XII.

### OF JUSTICE AND CHARITY.

The question which the preceding chapter seems to force upon us is, whether justice covers the whole ethical field from one point of view, and charity from the other—whether they be the same principle realized in different circumstances—or, whether they divide that field between them, and are essentially different principles. My contention will be that—

(a) *The principles of justice and charity<sup>1</sup> are identical; their separate realization is impossible; and their common realization necessarily culminates in the same action.*

Though it may not hitherto have been found possible to distinguish obligations either into perfect and imperfect, or into

<sup>1</sup> Thomas Aquinas distinguishes between *caritas* and *liberalitas*—the former being a Christian grace unattainable by the heathen, the latter a moral virtue. Charity in the sense in which I here use it, which is the popular and common ethical sense, thus corresponds to *liberalitas*, not to *caritas*, which is the *ἀγάπη* of St Paul. In this sense the relation to justice which the great schoolman assigns to charity entirely corresponds with that for which I contend, though I do not admit that absolute justice does not include *caritas* even in its theological sense. For charity, the word equity might perhaps be substituted, though to the English legal mind it would be confusing.—*Summa, Prim. Sec.*, quæ. lxvi. art. 3 and 4. See also *Prim. Sec.*, quæ. lxxxviii. art. 2, in which he lays it down that a *peccatum veniale* may be converted into a *peccatum mortale* by a change of circumstances, and *vice versâ*.

negative and positive, in such a manner as thereby to discover the basis for a definition of the sphere of jurisprudence, is that any sufficient reason for concluding that obligations do not admit of a distinction in principle of any kind, and that all delimitation of our science in that direction must be abandoned as a mistake? That such a protest against the doctrine which I have espoused should still arise in the minds of some of my readers, is all the more conceivable as it has the support of a writer whose views on the origin of our rights, and on the idea of property, coincide with those which I previously submitted, more closely than the views of any other writer with whom I am acquainted ; I mean M. Cousin.

In his criticism of Smith's doctrine that labour is the origin of property, M. Cousin raises the question whether the whole field of human duty falls within the domain of the principle of justice, and consequently within the limits of natural law. To this question, which under another aspect is precisely that with the discussion of which we are at present occupied, he returns a negative answer. "The principle, which is the soul of Smith's book," M. Cousin says, "is the grand principle of the liberty of labour. Before this principle Smith has beaten down all obstacles, interior and exterior, which oppose themselves to liberty, and consequently to the power of production, to the development of riches, private and public, in each country, and in the world at large. By this means he has greatly reduced the function of governments ; and, to tell the truth, he has too much reduced it. It is from Smith's book that has proceeded the famous maxim, *Laissez faire, et laissez passer* : superintend everything, and interfere with

nothing, or with scarcely anything. Here Smith's errors commence, and they are the exaggeration of a truth, as he himself said of the errors of the moral theories which had preceded his. Yes, justice consists in the respect for and the maintenance of liberty. It is the grand law of society, and of the State which represents society; but is justice the only moral law? We have proved that alongside of that law there is another which does not simply oblige us to respect the rights of others, but which makes it a duty for us to solace their miseries of every kind, to come to the aid of our fellow-creatures, even to the detriment of our own fortune and wellbeing. Examine the principle of the smallest alms: you cannot reduce it to justice alone, for that trifling sum of money which you believe it to be a *duty* to give to an unfortunate, he has not the smallest *right* to exact from you. This duty does not correspond to a right; it has its principle in a disposition of our nature, and in a particular law which we have elsewhere analyzed with care,<sup>1</sup> and denominated charity. Strange as it may seem, the same man who had reduced all morality to sympathy scarcely recognized in politics any other right than that of justice. This fact may aid us in conjecturing what would have been the character of Smith's grand political treatise. Judging by the maxims scattered over the inquiry into the nature and causes of the wealth of nations, we may be permitted to conjecture that his natural jurisprudence reduced the function of laws and of government to the protection of liberty.<sup>2</sup> We ourselves, by

<sup>1</sup> *Philosophie Sensualiste, Premier Appendice*, p. 313, *infra*, p. 322.

<sup>2</sup> It is not improbable that Smith may have changed his mind on this subject,

our own reflections and the development of our principles, have arrived at the conclusion that justice, the protection of liberty, is the fundamental principle and the special mission of the State. But we believe that we have established, at the same time, that it is absolutely impossible not to ascribe to that great individual whom we call a society, some portion at least of that duty of charity which speaks so energetically to every human soul. According to us the State ought, above all, to vindicate justice; but it ought also to have a heart and bowels. It has not fulfilled all its task when it has caused rights to be respected. Something else remains for it to do—something grand and noble: it remains for it to exercise a mission of love and charity at once sublime and perilous; for we must not forget that everything has its danger: justice, whilst respecting the liberty of a man, may, in all good conscience, leave him to die of hunger; charity, in saving him morally and physically, but above all morally, may arrogate to herself the right to do him violence. Charity has covered the world with admirable institutions; but bewildered and corrupted, it is she also who has raised and authorized and consecrated many a tyranny. We must restrain charity by justice, but we must not abolish it, or interdict its exercise to society. Smith did not comprehend this, and from fear of one excess he has fallen into another.”<sup>1</sup>

Now I quite admit that Smith has committed the error of which Cousin has accused him, and that he has so limited the as his lectures on jurisprudence and natural theology were amongst the papers which he burned a few days before his death.—Life prefixed to M'Culloch's edition of the *Wealth of Nations*, p. xviii.

<sup>1</sup> *Ecole Ecossaise*, p. 296 *et seq.*

functions of society and of the State, which is the organized expression of society, as to rob it of many of its most sacred rights, and to deprive it of many of its most important offices. In the very mildest view of the matter, Smith has absolved mankind from a large portion of the duties which God has laid upon man. But, in so doing, he has simply given in his adhesion to the school of jurisprudence prevalent in his day, to which Cousin has also unwittingly committed himself. In excluding charity from the protection of the State, Smith has only recognized a legitimate consequence of its separation from justice, for which M. Cousin himself contends so keenly. The consequence is one which Smith accepts, in common with all the other adherents of the absolute distinction between perfect and imperfect obligations, M. Cousin being, so far as I know, the only writer of note who, whilst throwing charity beyond the sphere of justice, insists that it shall be recognized as one of the objects of jurisprudence, and admitted within the pale of positive law. The theoretical source of Smith's error, moreover, if I am not greatly deceived, is altogether different from that which Cousin has indicated. Smith's mistake consists not in failing to call into action another principle than justice, but in limiting the action of justice itself; and this inadequate view of justice is one which we shall see presently is common to Smith and his critic. He has seen only the negative side of justice, and consequently, like Kant, he has assigned to legislation, which is built upon it, only the negative duties of restraint. But is there any reason why justice should not say "do," as well as "do not;" "act in behalf of liberty," as well as "do not act against



it ;” “ anticipate the restraints which will be imposed upon it by poverty, ignorance, brutality, and tyranny, and prevent the occurrence of crime, as well as its recurrence ” ? If liberty be the object of justice, whatever is antagonistic to liberty it belongs to justice to remove ; and Smith needed not to travel beyond his own principle in order to find grounds upon which to recognize all the duties which Cousin properly assigns to the State. But if Smith was thus led, by an inadequate conception of the nature of justice, to exclude from its province a large domain which legitimately belongs to it, was it not an equally inadequate conception of it which led Cousin to assign this domain to another principle, which, at bottom, is neither more nor less than the principle of justice itself, acting in different relations—*i.e.*, under different external circumstances ? If it were true that the duties of charity were duties which, being measured by no corresponding rights, fell into an independent territory of their own, where the voice of justice was unheard, they would indeed, as M. Cousin says, be “ perilous duties ;” and I believe it is the popular adhesion to the doctrine which he advocates with so much zeal which has gathered around them more than half their perils. But have we in reality any ground for reverting to a belief in this neutral territory<sup>1</sup> between justice and injustice, which Thomas Aquinas rejected so emphatically in his day,<sup>2</sup> even in deference to such names as Kant and Cousin ?

<sup>1</sup> “ If we contemplate actions in their true and real connection, we shall find that nothing is indifferent, because every action is either one corresponding, or one not corresponding to the order of reason (*ordo rationis*), and nothing can be conceived as holding a middle place.”—Neander, vol. viii. p. 239.

<sup>2</sup> *Summa Theologie, Prima Secundæ*, quæst. xviii. art. 9.

Justice and injustice are not, like pleasure and pain, *contraries* merely, but *contradictories*; <sup>1</sup> for not only does the affirmation of the one imply the negation of the other, but the negation of the one implies the affirmation of the other. Between pleasure and pain there is a border-land of indifference, though even this is debateable ground; but justice and injustice, right and wrong, both reach the watershed on the mountain-top; and that charity which does not flow down the valley of life like a fertilizing stream, will speedily find its way to join those headlong torrents which roar down the valley of the shadow of death. *Omne minus bonum habet rationem mali* <sup>2</sup> seems true, at least to the extent to which it hands over to the dominion of darkness whatever does not belong to the kingdom of light; though it is not true as excluding degrees of virtue and vice, <sup>3</sup> and a consequent progress in perfection or degradation. Viewed in this aspect, the question of the limits of justice belongs to the subject of theology rather than of jurisprudence; and it is to the theologians and schoolmen of the middle ages, to their modern interpreters in Germany, and to the "Cambridge Platonists," as

<sup>1</sup> Hamilton's *Lect.*, vol. ii. p. 436.

<sup>2</sup> "Malum enim est privatio boni."—St Augustin quoted by T. Aquinas, *Prima Secundæ*, ques. xviii. sect. viii. Müller on *Sin.*, vol. i. p. 61.

<sup>3</sup> The inability of the Stoics to maintain the distinction between obligations which they had partially recognized was probably the cause of most of their "contradictions." For example, they violated it by maintaining that there is no mean between virtue and vice, and that virtue admits neither of increase nor diminution, the latter maxim being again contradicted by the whole object of their system, which was increase in virtue, the natural implantation of which in all men was the very root of their doctrine.—Zeller's *Stoics*, p. 249. As regards the identity of justice and charity in particular, they seem to have been consistently inconsistent, Seneca being specially explicit.—Zeller, 298.

they are called in this country,<sup>1</sup> that I must consequently refer for its exhaustive discussion. It is necessary that we should bear in mind, however, as I have said already, that the whole doctrine of the Roman Catholic Church on the subject of works of supererogation<sup>2</sup> (*opera supererogationis*)—works, that is to say, which profess to transcend the law—rests on the same limited and imperfect conception of justice which in jurisprudence has led to the distinction between perfect and imperfect obligations. They were regarded not as duties, but as good works beyond the sphere of duty, and independent of it; just as works of charity, in which in no small measure they consisted, are regarded by M. Cousin as beyond the sphere and independent of the principle of justice. The fallacy involved in the train of reasoning by which these works were inculcated, and of the consequent distinction in principle between *consilia* and *præcepta*, of which we find traces even in Thomas Aquinas,<sup>3</sup> is excellently exposed by Müller on Sin.<sup>4</sup> But our present object will be better attained by examining for ourselves the far clearer, if less subtle, exposition which

<sup>1</sup> *Rational Theology and Christian Philosophy in England in the Seventeenth Century*, by Principal Tulloch. Mr Maurice has some excellent remarks on the subject in his *Lectures on Christian Ethics*, Lect. xiii. p. 201.

<sup>2</sup> A modern English writer maintains that to do away with the belief in the possibility of works which transcend the sphere of duty was one of the special functions of Christianity. "Extraordinary services to humanity become ordinary and imperative in the Christian commonwealth."—*Eccle Homo*, p. 299.

<sup>3</sup> *Prim. Sec.*, ques. cviii. art. 4.

<sup>4</sup> Vol. i. p. 50. This important but somewhat abstruse work is now very fairly translated into English. Considering the poverty of our native literature, it is surprising that the industry of translators does not oftener take the direction of jurisprudence. A well-selected series of works, or portions of works, beginning with the scholastic jurist, and ending, say, with Leibnitz, would make a precious addition to most law-libraries, and might be profitable even to the booksellers.

M. Cousin has presented of what essentially is the very same argument against which Müller contends. Let us examine his statement, then, that there are duties which have no reciprocal rights in the light of the illustrations which he has adduced; and for this purpose let us turn to that portion of his writings to which he refers in the passage I have just quoted. It is the appendix to his work on the Sensualist Philosophy;<sup>1</sup> and in it will be found an elaborate discussion of the mutual relations and limits of justice and charity. Almost at the very outset of this discussion the following pointed sentence seems to concede the whole matter in dispute: "Duty and right are brothers; their common mother is liberty. They are born the same day, they grow up, they develop, and they perish together." We cannot be so unjust to M. Cousin as to set down this pithy dictum as a mere rhetorical embellishment; and if we are to attach to it a serious meaning, we can regard it as nothing short of an unqualified recognition of the fact that rights and duties are reciprocal and co-extensive. Yet this same dictum, in terms which, if not identical, are equally unequivocal, might be quoted from the writings of moralists and jurists without number, who, like M. Cousin, repudiate the results to which it leads,<sup>2</sup> and who, with him, would indignantly reject the notion of confining the sphere of duties within the limits

<sup>1</sup> P. 313 *et seq.*

<sup>2</sup> A curious illustration of the consequences of separating the *justum* from the *decorum* is given by Barbeyrac. When commenting on Grotius (vol. i. p. 68), he says that according to his author, though it may be honest and commendable to content oneself with one wife, one cannot be said to do wrong in taking two. Such was no doubt the logical consequence of what Grotius had said, but it was heartless in Barbeyrac to point it out.



which they themselves had assigned to that of rights. If the truth be, as we contend, that the two spheres are absolutely co-extensive, and that as regards human relations the reciprocity of rights and duties has neither limits nor exceptions (for in relation to the divinity, as I have already explained, we are debtors only, and not creditors), the circumstance of this fact being propounded thus unawares, and as it were involuntarily, furnishes a striking illustration of the greater trustworthiness which often belongs to the instinctive perceptions of the reason than to the results of our conscious mental processes. Let us test it, then, by the instance which M. Cousin regards as most clearly fatal. The poor, he tells us, have no rights—none at all events which constitute claims on our justice—and consequently our duties to them, if they exist at all, must be founded on another principle. If the fact be as stated, the inference is indisputable; and our concern is consequently with the question of fact. With a view to its solution let us recall for a moment what we have formerly said of the origin of our rights. We found them to originate in the power of life, or, in other words, in the distribution which God had made of His gifts to His creatures, it being true, without exception, that every gift which we receive from Him comes to us accompanied by the consciousness of a right to its retention, its exercise, and the results of its exercise. In this view we have the fullest concurrence of M. Cousin himself. “Property is sacred,” he says, “because it represents the right of personality itself. The first act of free and personal thought is an act of appropriation. Our first property is ourselves, is our *ego*, is our liberty, is our power



of thought; all other properties are derived from this, and reflect it.”<sup>1</sup>

Now, if this be so, the question whether a pauper has rights resolves itself into the question whether he has possessions, or rather, whether he has that original possession of personality, of *human* life, in which, as M. Cousin says, all other possessions originate. If the answer to this question be negative, if we are dealing not with a *persona* but a *res*, we postulate the condition, not of pauperism, but of slavery, which even the Roman jurists pronounced to be an institution *contra naturam*, and which, in our view of the matter, cannot claim to exist either ethically or legally. The theory of slavery, moreover, annihilates duties as well as rights, for we can have no duties, in the human sense, towards things. It thus carries us beyond the pale of charity, as M. Cousin defines it, as well as that of justice. On the other hand, the moment we depart from this theory, in its absolute rigour, we just in so far assume the existence of a *persona* more or less perfect, and answer the question in the affirmative. But M. Cousin is not dealing with slavery, and the existence of the *persona* is inseparable from freedom. The answer then, in the pauper's case, must be affirmative. But if the answer be affirmative—if the existence of the *persona* and its consequences be admitted—then it is clear that the rights which accompany this primary possession and its adjuncts exist in the humblest specimen of humanity, just as fully as do the rights that accompany the more multifarious possessions which have sprung from the self-same source in others. Now, though M.

<sup>1</sup> *Philosophic Sensualiste*, p. 319.

Cousin maintains that there may be duties to which no rights correspond, he does not hold the converse of the proposition, and maintain that there are rights without corresponding duties—though he maintains that I may have duties towards you which confer on you no rights, he does not maintain that you may have rights against me which impose on me no duties. If the pauper has rights then, on M. Cousin's own showing, I have duties towards him corresponding to his rights, whatever they may be; and as it is only duties which do not spring from rights that fall beyond the sphere of justice, my duties to the pauper not being of that description, necessarily fall within the sphere of justice.

It is no answer to this argument to allege that, by parallel reasoning, it would be easy so to extend the domain of charity as to make it include that of justice; because what I am contending for is that the principles which lie at the root of justice and charity are identical, though seen from different points of view. The principle which, in the case of justice, we see in the light of a right to claim, in that of charity presents itself in the light of a duty to give.

But however conclusive this argument may seem, does it not, by limiting the legitimate action of the principle of justice, lead at least to partial injustice? In imposing on me the duty of preserving his life, does not the pauper, to that extent, make an inroad on my possessions, and rob me, so to speak, of gifts which were a consequence of the original gift of life to me? My answer must be to remind you that subjective rights are self-limited,<sup>1</sup> their exercise being dependent

<sup>1</sup> *Ante*, cap. vii., *passim*.

on the recognition of objective rights.<sup>1</sup> So far from adding to my gifts, my rights, or my liberties, by refusing to recognize those of my neighbour, I should diminish them, or, in other words, render their exercise impossible, *to that extent*. There is no duty, however painful it may be, and however great may be the amount of immediate self-sacrifice involved in its performance, which, when fully understood, is not also a privilege, the exercise of which may be claimed as a right. Nay, on the principle of that profound maxim that “it is *more* blessed to give than to receive,” it would seem that the balance of gain is necessarily in favour of him who performs the sacrifice, not of him for whom it is performed. If, with a view to this gain, he seeks for an occasion of self-sacrifice which the rights of his neighbour do not impose on him, he performs a work of supererogation, to which no reward is attached in the order of the universe. He has been guilty of an act of mistaken selfishness, which, like all selfishness, is a loss precisely to the extent to which it oversteps the line of duty. Our duties to others and to ourselves, our own rights and interests, thus fit in exactly. There is no vacant space over, which we can crop with charity and reap for our own private ends. We can no more be selfishly-unselfish than we can be unselfishly-selfish. To the fullest extent, therefore, to which charity is a duty founded on the rights of others, it is thus a duty founded on our own rights. As mankind is constituted, the interests of the subject and the object—my rights and thy rights—are inseparable; and it is only when I carry the exercise of charity beyond the sphere of justice, when I

<sup>1</sup> *Ante*, p. 236.

pass the point at which liberty degenerates into licence, that I begin to squander my means, to abridge my powers, and, in the mistaken belief that I am adding to the means and the powers of my neighbour, commit an act of injustice from which we mutually *and equally* suffer. Just as we shall see presently that the highest liberty implies the most perfect order, so here the widest charity is identical with the strictest justice. The two culminate in the same point. Beyond this point each sinks into its own opposite, by the weight of the self-contradiction which all further attempt at its realization involves. Up to this point all is mutual gain, and all sacrifice on either side is merely apparent; beyond this point all is common loss.<sup>1</sup>

But it will be objected that, according to this view, self-denial and self-interest practically become synonymous. Such unquestionably is the case; the only difference between the self-interest of which we here speak and that which commonly exhibits itself in the form of selfishness, being that the former is an enlightened self-interest, such as perfect intelligence would prescribe; whereas the other, always in reality, though not always demonstrably, is unenlightened, and such as only folly or knavery would commend.<sup>2</sup>

<sup>1</sup> My late gifted colleague, Dr Robert Lee, talking of this subject to me, said, very truly, that, "when argued out, natural law assumes the precision of mathematics." Would that the same could be said of the concrete factor of positive law! But it is something surely to be protected against error, even on one side.

<sup>2</sup> This conception of the *solidarité* of interests, and the possibility of reducing vice to ignorance, as well as virtue to knowledge, on which so much of the argument in favour of compulsory education rests in modern states, though not acted upon to the same extent, was as familiar to the better minds of heathendom as of Christendom.—See Plato, *Protag.*, c. 37, sec. 38, *et pass.*

On the very same principle on which "honesty is the best policy," charity, in so far as it is an act of justice, nay, to the full extent to which it is not an act of injustice to others, is self-interest. Nor need we be scared from these conclusions by the consideration that, as mankind is constituted, policy would, in general, be a very unsafe ground on which to preach charity, or even honesty. It is the shortness of our vision which makes the ground unsafe. If we saw through the whole vista of policy as God sees through it, the ground would be sufficient; and we should not only, with Kepler, "think God's thoughts," but do God's deeds after Him.

But though, in preventing the poor of our own neighbourhood, or our children and near relatives, from diminishing what may be regarded as the common stock of human life and liberty by sacrificing the gifts which God has bestowed on them, we may be fulfilling the requirements of that principle of justice of which life and liberty are the objects, what shall we say when we come to other virtuous acts, to deeds of general philanthropy, or to those special acts of heroic self-devotion by which the rights, the interests, and the liberties of the individual, nay, the individual himself, are freely sacrificed for the interests of others? M. Cousin, following Cicero,<sup>1</sup> adduces the instance of Publius Decius and his descendants. The positive laws of most modern states have made charity compulsory, and the laws of all civilized states have enforced the mutual obligations of parents and children; but no code of laws ever decreed, or could decree, that, for the sake of his country, a man should court death with greater eagerness than

<sup>1</sup> *De Fin.*, lib. ii. c. 19.



ever Epicurean courted pleasure, still less that three members of the same family in succession should do so. Was the self-devotion of the Decii then, or the martyr-death of Regulus, we shall say, an act of justice? We answer the question by another. Was it an act of injustice? or must we again take refuge in a neutral territory between the just and the unjust? Or some may perhaps be disposed to say that, though an act of the highest virtue to others, it was an act of injustice to himself. Decius, I reply, was God's creature as much as any other Roman, and God cannot have so ordered the world as that an act of virtue to one should be an act of injustice to another. If it was an act of virtue at all, it certainly was an act of justice also—the fulfilment of a duty, if not of the kind which men can impose upon men, at all events of the kind which God imposes on heroes and on saints. And yet this error is one which is constantly committed, as, for example, in defending capital punishment, intervention, &c., on the ground of expediency, whilst admitting their injustice. If they cannot be brought within the range of justice they cannot be justified—they are unjust. To suppose the same action to be at once virtuous and unjust would be to justify injustice, to confound virtue and vice.

The mention of Cicero will recall to many the discussion in the *De Finibus*, in which Regulus is maintained to have been actually happier in the midst of tortures than Thorius, stretched on a bed of roses sipping the choicest wines. In identifying virtue with utility and self-interest, even in this present world, I of course accept this argument to the fullest extent, though I do not deny the tendency which it has to

degenerate into a mere logomachy, turning on two distinct meanings of the word "happiness." But what I wish to point out as important for our present purpose, is, that in consulting his real as opposed to his apparent interest in circumstances so painful, Regulus is represented by Cicero, not as having exceeded, but as having nobly fulfilled his duty. The great philosophic jurist knew nothing of works of supererogation, and the great juristic philosopher knew as little. "It is a mistake," says Kant, not very consistently with his own system, "to suppose that anything a good man may do can surpass his duty."<sup>1</sup>

Not satisfied with the few classical instances of the union of self-devotion and duty, of which I had reminded him, my learned friend and colleague, M. Brocher, has invited me to enter with him still further on the field of casuistry, and I cannot decline the challenge of so distinguished and so considerate a critic.<sup>2</sup>

Heroes and saints are exceptionally endowed and sustained, and their responsibilities are exceptional in proportion to their gifts. They are, as it were, official representatives of humanity; and to say that it was the duty of Regulus to die for his country, is only like saying that in a shipwreck, if the last man cannot be saved, it is the captain's duty to see that he is that man. Where the question is between death and dishonour, we do not require to stretch self-interest very far in order to reconcile it with self-sacrifice. But M. Brocher rightly

<sup>1</sup> *Theory of Religion*, Semple's trans., p. 58.

<sup>2</sup> In addition to being professor of law in the University, M. Brocher is president of the Cour de Cassation at Geneva, and it would be difficult to name any living jurist who combines science with experience in so eminent a degree.

insists that if the identification of justice and charity, of duty and devotion, of might and right be complete, we ought to find in it a rule of conduct of universal applicability ; and, in order to demonstrate its inadequacy for this purpose, he falls back on the old device of the plank : “ If two individuals are thrown by shipwreck on a plank which can save only one, and they mutually endeavour to plunge each other into the abyss, they act on a brutal instinct of self-preservation against which it is vain to inveigh. Impunity is conceivable, but we cannot go the length of commendation. If one of these individuals sacrificed himself to the other, it is he most certainly who should receive our sympathies.” Now, to say that, in circumstances so inimical to the exercise of reason, an ordinary human being might be entitled to escape human punishment for yielding to an irrational impulse, no more touches the question of the ultimate identification of justice and charity, or of might and right, than to say that a madman is entitled to impunity for murdering his keeper. The ground on which impunity would be extended to either case would not be the righteousness of the actor, but the impossibility of ascertaining the presence or measuring the extent of his responsibility. And if in employing the word commendation (*louange*), M. Brocher supposes that my principle carries me the length of commending the stronger man for pushing the weaker man into the sea, he certainly, as he himself indulgently suggests, has gravely mistaken my meaning. This would be to confound the spasmodic exercise of ephemeral force with force exercised in accordance with reason ; or, in other words, the fundamental and general with the superficial and exceptional

impulses of our nature, to the former of which I have been careful to limit the epithets of might and power. The stronger man, in the circumstances M. Brocher has imagined, would be in one or other of these three positions: (*a*) He would be self-possessed, as is popularly but not inaccurately said, to the extent of having his exceptional and ephemeral impulses under the control of his general and permanent will—his physical force would be subject to his rational power. In such circumstances it is conceivable that his knowledge of the relative value of his own life and that of his fellow-sufferer, from an absolute point of view, might be such as to enable him to decide the question of life and death between them. It is conceivable that the other man might be a murderer under sentence of death, or that he might just have committed a murder, or have been mortally wounded and be already at the very point of death. But it is far more likely that the case would be one in which, in justice and in charity alike to his neighbour and to himself, he ought to commit his own soul to God rather than run the risk of a false decision; and that his real power, in place of enabling him to push the other from the plank, would give him strength of will to plunge himself into the sea. (*b*) He would be wholly bereft of rational power, in which case the instinct on which he acted would have no more moral significance than if he had accidentally killed his neighbour or himself. It would be one of those physical occurrences which are outside of the sphere of ethics and jurisprudence, just as much as the storm that caused the shipwreck. (*c*) He might be partially responsible and partially irresponsible. In this case, whether he drowned his comrade

or himself, his act would have that mixed character which belongs to most human actions. But it would fail in justice and in duty, on the one side and the other, precisely to the same extent to which it failed in charity and in devotion ; and if he himself were the survivor, his own after-life would tell him how inseparable were the principles.<sup>1</sup>

<sup>1</sup> No mistake could be greater than to suppose that the phenomenon of the instinct of self-preservation giving place to loftier motives is one rarely exhibited by ordinary persons. It is rare, on the contrary, to find a soldier or a sailor who does not exhibit it, or who would not be ashamed to regard it as transcending his duty. If it be responsibility that shows the man, as Aristotle tells us, on the authority of Bias (ἐν δοκεῖ ἔχειν τὸ τοῦ βίαντος, ὅτι ἀρχὰ τὸν ἄνδρα δεῖξει, *Ethic. Nic.*, v. 1. 15.), it is danger that tests his fundamental characteristics ; and I cannot bring home to my readers more impressively the fact that these characteristics are as I have represented them in the text, than by quoting a few touching lines commemorative of an actual occurrence, which I adduced for a similar purpose many years ago.—Inaugural Lecture, 1863, p. 30. A young private in one of our infantry regiments was taken prisoner by the Chinese, and commanded to perform the *Koutou*, on pain of instant death. He unhesitatingly preferred the latter alternative. The simple story was told by Sir Francis Doyle, in verses which I hope will preserve a permanent place in our literature :—

“ Last night, among his fellow-roughs,  
He jested, quaffed, and swore,  
A drunken private of the Buffs,  
Who never looked before.  
To-day, beneath the foeman's frown,  
He stands in Elgin's place,  
Ambassador from Britain's crown,  
And type of all her race.

Poor, reckless, rude, low-born, untaught,  
Bewildered and alone ;  
A heart with English instinct fraught  
He yet can call his own.  
Ay, tear his body limb from limb,  
Bring cord, or axe, or flame ;  
He only knows that not through him  
Shall England come to shame.

Far Kentish hop-fields round him seem'd  
Like dreams to come and go ;  
Bright leagues of cherry-blossom gleam'd  
One sheet of living snow.  
The smoke above his father's door,  
In grey soft eddyings hung ;  
Must he, then, watch it rise no more—  
Doom'd by himself so young ?



(b) *The doctrine of the identity of the principles of justice and charity was taught by Christ's mediatorial sacrifice, and is implied in the whole scheme of redemption.*

The reader will only be giving utterance to a sentiment which has received much prominence from the teaching, not of Christianity, I think, but of Christians, if he should meet the doctrine which I have been enunciating by the question, whether Divine justice be not transcended by Divine mercy? The act of our creation as fallible beings may fall beyond the sphere of our ethical contemplation, and revelation may have done nothing to bring it within our ken. But have we not been told expressly that the act of our redemption from the just consequences of our sins was a work of supererogation? The very highest view that has ever been taken by Christians of the merit of good works, the most extreme construction that ever has been put on the Epistle of St James, falls far short of bringing the goodness of God within the limits of justice.

Yes, honour calls!—with strength like steel  
He put the vision by;  
Let dusky Indians whine and kneel;  
An English lad must die.  
And thus, with eyes that would not shrink,  
With knee to man unbent,  
Unflinching on its dreadful brink,  
To his red grave he went.

Vain, mightiest fleets of iron fram'd,  
Vain, those all-shattering guns,  
Unless proud England keep untam'd  
The strong heart of her sons.  
So let his deed through Europe ring:  
A man of mean estate,  
Who died as firm as Sparta's king,  
Because his soul was great."

Once for all, then, it is *might* of the kind that this poor young fellow exhibited, and not the might that enables one man to push another off a plank, that is identical with *right*. It is this kind of might which made the colonial empire of England, which, I contend, governs the world, and which I claim as the basis of the *de facto* system of jurisprudence.

According to the theology of all the Churches of the Reformation, it is to God's free grace alone, and not to our righteousnesses—"that are as filthy rags"<sup>1</sup>—that we are indebted for His bounty. Here, then, is surely an instance in point, for the charity of God, in transcending the limits of justice, cannot possibly pass over into the opposite region of injustice. Since God cannot possibly be unjust, there must be some other principle, reconcilable but not identical with justice, on which He acts: some neutral territory between justice and injustice on which His mercy displays itself. But what, in this view, do we make of the merits of Christ which are imputed to us? of His vicarious suffering for sin, and of our faith in this suffering which is "*counted to us for righteousness*"?<sup>2</sup> An argument derived from God's forgiveness of sin, so long as it was viewed by the light of natural religion alone, might have been maintained in support of M. Cousin's doctrine; and it was in this view, that in treating of creation, and of the consequent relation of Creator to creature in general, we admitted that the correspondence between rights and duties which governs human relations is there inconceivable. By the light of natural reason we can no more understand why a just God should forgive sin than why a perfect God should permit it; and if we maintain even the relative character of sin, we are compelled either to despair of forgiveness altogether, or else to take refuge in a merciful God who is willing to sacrifice justice. But when taken in connection with the scheme of redemption, the Divine clemency, so far from supporting the notion of a possible separation between charity and justice,

<sup>1</sup> Isa. lxiv. 6.<sup>2</sup> Gal. iii. 6.

seems absolutely fatal to it ; for the whole end and object of that scheme was to bring the mercy and long-suffering of God within the sphere of His justice—to reconcile it with justice, or to prevent it, unmerited as it was by mere man, from being unjust.<sup>1</sup> If even God himself cannot, consistently with justice, extend to His creatures a mercy beyond their merits, without falling back on an expedient which is at variance with the ordinary arrangements of His providence, much more must such a proceeding be impossible to creatures who are absolutely bound by these arrangements. In this case, most emphatically, the rule is proved by the exception ; since even the exception is removed by the miraculous interposition of Him who “of God is made unto us righteousness.”<sup>2</sup> If justification by free grace on God’s part be a mystery, on man’s part it is an impossibility ; and human pardon, mercy, charity, and, to sum up all, virtue in every form, must be contented to keep within the pale of the most rigid justice.

Nor is the case altered if, in place of the ordinary view of redemption as a mysterious buying-off from merited punishment, we adopt the deeper, and probably far truer view of it, as progressive deliverance from sin by a growing consciousness of the filial relation in which we stand to God, and consequent acceptance of His will. For, if mercy be dependent on, and proportioned to, the extent to which man is thus purified from sin by reunion with the Divine, then is mercy plainly coincident with justice, and this equally by whatever means this reunion may have been effected. The regenerated creature, the new man in Christ, in so far as the original

<sup>1</sup> Matt. v. 17, 18 ; Luke xvi. 16, 17 ; Rom. iii. 31.

<sup>2</sup> 1 Cor. i. 30.

image in which he was formed is restored to him, has become *entitled* to mercy, or, in other words, the mercy which is extended to him has become justice. The act of grace, like the origin of sin, “passeth all understanding,” and remains unexplained. But its reality, which to a certain extent may be tested even by objective evidence, being admitted, it lays a logical foundation for what is technically called “absolution.” The *new-man* can claim absolution on the *de facto* principle. God has given him a *right* to it, in place of giving it to him without right, or contrary to right.

Nor was the doctrine of the unity of justice and mercy peculiar to the New Testament. “Those who conceive of justice as opposed to mercy,” says Mr Erskine,<sup>1</sup> “must regard the Psalmist’s utterance, ‘Also unto Thee, O Lord, belongeth mercy, *for* Thou renderest to every man according to his works,’<sup>2</sup> as a complete subversion of the meaning of words; and I have sometimes thought they must be tempted to conjecture that the copyist has, by mistake, substituted the word *mercy* for *justice*. They have been accustomed to suppose that nothing worse could befall them than that God should render unto them according to their works, and their hope in His mercy has just been the hope that He would not so deal with *them*; the idea, therefore, that mercy itself will render unto them according to their works, seems to be the annihilation of all hope.”

“I believe,” he continues, “that all this is founded on misapprehension, and that in God mercy and justice are one and the same thing,—that His justice never demands punishment

<sup>1</sup> *Spiritual Order*, p. 71.

<sup>2</sup> Psalm lxii. 12.

for its own sake, and can be satisfied with nothing but righteousness, and that His mercy seeks the highest good of man, which certainly is righteousness, and will therefore use any means, however painful, to produce it in him. If men could understand that God's purpose, in rendering to them according to their works, is to instruct them in the true nature and character of their works, that so they may apprehend the eternal connection between sin and misery, between righteousness and blessedness, and thus be led to flee from sin and take hold of righteousness, they would also understand that it is in mercy that He deals thus with them, and that, in fact, the purposes of mercy can in no other way be accomplished."

"I know that I should be a minister of good to many if I could help them to apprehend that this is the meaning of God's justice, and therefore that it is to be as much trusted as His mercy. They have been accustomed to look upon Christ as their Saviour, because He has delivered them from justice by suffering the penalty which it denounced against them, whilst, in truth, He is their Saviour, by revealing to them that justice is their friend, being only the enemy of their enemy."

It is in the direction of separating justice from mercy, as here indicated, rather than of separating mercy from justice, that the ordinary teaching of Christianity has gone most widely astray. That God could not be merciful without being just seems always somehow to have been admitted, however irrationally it might be explained; but that He might be just without being merciful was, and is still, strenuously contended for. Of all the fruits of this unhappy severance of the Divine



attributes, the bitterest surely has been the belief in a region of final reprobation from which mercy is for ever shut out, and to which those who are impenitent in this world are condemned for ever, not for their good or for any good—not, indeed, with any object at all, except simply the satisfaction of what is called “God’s justice.” I say “belief;” for as we cannot penetrate into each others’ minds, I am bound to accept as the beliefs of others what they tell me they believe, however little they may be in accordance with their conduct. But often and earnestly as I have heard this doctrine preached, I should be guilty of great dishonesty if I were to say that I *ever* believed it. And the longer I live the less consistent does it seem to me with the teaching of Him who said that “His yoke was easy and His burden light.” I have been accused of being “one of those who are terribly at ease in Zion.” But I cannot but think that much of the uneasiness which many suffer, with reference both to this world and the next, arises from their believing too little in God and too much in the Devil.

(c) *The doctrine of the identity of justice and charity was not first promulgated by Christ, and is not exceptionally Christian.*

Truth is one and eternal. No truth, then, no portion or aspect of truth, no doctrine that is true, can be either exceptional or new. Moreover, to ascribe either the revelation of truth to mankind, or its recognition by mankind, to a particular epoch, is to cut off humanity of the previous time from the Divine element which constitutes the human characteristic, and to interrupt the current of human identity. More definite and consistent revelation from within and

from without, clearer recognition and fuller acceptance of the truth, and not the discovery of novelties, are the phenomena of progress in all those departments of science which have man for their object. I altogether repudiate the division of the history of mankind into epochs in which man was and was not conscious. Man, as such, is a conscious being. An unconscious man is a contradiction in terms; and—inasmuch as the doctrine in question is a revelation of consciousness, as well as of external observation, and of the word—I no more agree with those who maintain that Christ first taught that charity was a duty, than with those who date *fraternité* from the French Revolution, or with Hegel when he says that “the mandate *know thyself* was first given to the Greeks.”<sup>1</sup>

But if this was so, the doctrine in question must have a place in the history of opinion. We find, accordingly, that it was pre-eminently the doctrine of that ethical school which I regard as representative of what, more or less definitely, have always been the central beliefs of mankind. Nor is there any doctrine in their adhesion to which the disciples of Socrates followed his leading more unswervingly, or with reference to which they were more unanimous. I am aware that in this, as in so many other directions, an attempt has been made to separate Aristotle<sup>2</sup> from the other members of the Socratic school; and his divergence in so important a matter, if real, would, in so far as ethics are concerned, no doubt place

<sup>1</sup> *Phil. of Hist.*, p. 230. That it was given to those from whom the Greeks sprang is, at any rate, a historical fact.—*Ante*, pp. 98, 116, 122.

<sup>2</sup> Zeller's *Socrates and the Socratic Schools*, Eng. trans., p. 120; Grant's *Aristotle*, vol. i. p. 163.

him amongst the imperfect Socratics. The case is one in which it is difficult to reconcile the various expressions ascribed to him, so as to discover what Aristotle's opinion really was. My own impression is, that his objection to the manner in which Plato states the prevailing opinion arose merely from his sense of the danger which there was of the analytical examination of the virtues, as separate manifestations, being abandoned in consequence of their fundamental identification; and that, on this, as on all other occasions, he stepped forward as the champion of the analytical method. This view is strongly supported by the remarkable passage in the *Nicom. Ethics* (v. i. 15), in which he speaks of *δικαιοσύνη* as *τέλεια μάλιστα ἀρετή*, and as comprehending the others,<sup>1</sup> a passage which, to the mind of Thomas Aquinas, seemed not only to settle the opinion of Aristotle, but which greatly influenced his own view as to the inseparable character of the virtues.<sup>2</sup>

As Sir Alexander Grant disputes the genuineness of the fifth Book, his argument is not wholly invalidated by this passage, though it is seriously weakened by it in consequence of his admission that even the Eudemian Ethics are not an independent work, but merely Eudemus's "exposition of the theory of Aristotle, slightly modified by his own views." That Eudemus should have misunderstood Aristotle, or that he wholly dissented from his views and silently and inten-

<sup>1</sup> Αὕτη μὲν οὖν ἡ δικαιοσύνη οὐ μέρος ἀρετῆς, ἀλλὰ ὅλη ἀρετὴ ἐστίν: οὐδ' ἡ ἐναντία ἀδικία, μέρος κακίας, ἀλλ' ὅλη κακία.—*Nicom. Ethics*, v. i. 19.

<sup>2</sup> "Virtutes morales perfectas necesse est ad invicem connexas esse, ut altera sine alterâ esse non valeat."—*Prim. Sec.*, quæ. lxxv. art. 1. And as to their relation to justice, *v. Sec. Sec.*, quæ. lxxviii. art. 6 and 12.

tionally misrepresented them on a subject so often discussed in the school, are neither of them probable solutions of the difficulty. But be this as it may, if there be any single opinion that is traceable to Socrates personally, it would seem to be that of the unity of the virtues; and this instance, though by no means the only one, is perhaps one of the most remarkable, of the extent to which the views ascribed to him by tradition were anticipations of the teaching of Christ. I might refer to many passages in Xenophon, and also in the *Republic* and the *Laws*; but I shall select one which, belonging to the earlier Dialogues, is more unquestionably Socratic, and which has the farther advantage of taking up the discussion more directly in the aspect in which I have presented it.

The main point at issue between Socrates and Protagoras, in the dialogue which bears the arch-sophist's name, is almost identical with that which we have just been discussing with M. Cousin, and the solution which Socrates forced on his reluctant antagonist is precisely that at which M. Cousin might have arrived by a surer way than any that was open to Protagoras. The earlier portions of the dialogue contain perhaps the most vivid picture of the intellectual life of Athens to be found in the whole range even of these marvellous productions. The gayest banter is mixed with the deepest wisdom; whilst the sharpest satire that ever perhaps was turned against human pretentiousness and self-sufficiency is tempered, as it always is by Socrates, not only by an urbanity which would have done no discredit to the best days of chivalry, but by a forbearance and charity which

would have done great honour to the milder times in which we live. At last the point is reached at which Socrates, in a manner the least likely to alarm him, and, as it were by the way, places the Sophist face to face with the main difficulty. "But still, Protagoras, I am a little at fault in a small matter, which I must ask you to clear up for me, if you would have me complete. You say that virtue admits of being taught; and if I could be persuaded of it by any man, I should be persuaded of it by you. But, whilst you have been discoursing, there is a matter which has puzzled me, and regarding which I beg that you will set my soul at rest. You say that Zeus sent justice and modesty to men; and frequently, in the course of the discussion, you have spoken of justice, and temperance, and piety, and the like, as if taken together they were one—namely, virtue. Tell me then plainly whether virtue is a unity (ἓν), of which justice, temperance, and piety form component parts (μέρη), or whether these are all but different names for that same unity, which bears also the name of virtue. It is this which I miss in your discourse hitherto." "Nothing is more easy, my good Socrates, than to answer that question; for, virtue being one, those qualities of which you speak are clearly parts of it." "But whether," I said, "are they parts of it in the sense in which the features of the face, the mouth, the nose, the eyes, the ears, are parts of the face; or, in the sense in which portions of gold which differ neither from each other, nor from the whole, except in size, are parts of the mass of gold which they compose?" "As the features are parts of the face,



Socrates, so it appears to me." "Do some men, then," I asked, "possess one, and others another, of these parts of virtue, or must he who has one have all?" "By no means," he replied; "since many are brave without being just, and just without being wise." "Are wisdom and courage, then, also parts of virtue?" "Above all," he said, "wisdom more especially, seeing that it is the greatest of all the parts." "Each of them is different from the other?" "Certainly!" "And each of them has a special function, like the features of the face; for the eye is not like the nose, nor is its function the same; neither of the others is one like another, either in the function which belongs to it or any other respect. Is it so, also, with the parts of virtue? Is no one like another, either in its function or in any other respect? Plainly it must be so, if our example holds." "It is so, Socrates," he replied. "And," I continued, "then none of the other parts of virtue resemble knowledge, or justice, or courage, or temperance, or piety?" "None of them." "Come along, then, and let us inquire together what each of them is like; and, first, after this fashion: Is justice anything or nothing? I hold it to be something; what say you?" "I agree with you." "How, then, if any one were to say to us, Tell me, Protagoras and Socrates, is this thing which you call justice a just thing or an unjust thing? I would answer, a just thing. What vote would you give? the same, or a different one?" "The same," he said.

A similar inquiry is instituted regarding piety—it, too, is a thing, and a holy thing; and Protagoras, on the principle that things which are equal to the same thing are equal to

one another, is dragged into the admission, first, of the similarity, and, at last, of the identity of virtue and its component parts. The dialogue exhibits, at many of its turns, that almost oriental subtilty, which proves how entirely the great opponent of the Sophists was master of their weapons. For a time, in common with Protagoras, we almost lose the direction of the current; but, again, a little further on, the way we have made shows plainly enough how the stream has been running. "What then, Protagoras, should we reply to our interrogator if he were to ask us, Is piety then not a just thing, nor justice a holy thing?" Protagoras is painfully alive to the turn of affairs, but he rallies wonderfully. Even opposites, he alleges, have a certain resemblance; and so the virtues, though neither identical nor like, are not without certain elements of resemblance. "And have justice and piety," I exclaimed, in amazement, "according to your view of the matter, only a slight resemblance to each other?" Protagoras exhibits an unmistakable desire to change the subject, and Socrates gratifies him, or rather seems to do so. Nearly half of the dialogue passes; and when the subject is resumed (in the 33d chapter) Protagoras takes his stand on courage. All the virtues resemble each other pretty closely, it must be allowed, except courage; but nothing is more common than for the bravest man to outrage justice in the most flagrant manner. The exceptional instance is chosen with infinite skill, and seems far more likely to carry him through than that which M. Cousin selected. But the relentless and insatiable dialectic of his opponent was not to be robbed of

its prey. Courage is distinguished from rashness, the former being resolved into knowledge, the latter into ignorance, of what is truly terrible; and, in this respect, having the very same origin as cowardice. But evil alone, it had already been admitted by all, is truly terrible; and, farther, that no man chooses evil except from ignorance. No man therefore knowingly chooses the truly terrible. In choosing what seems to the ignorant to be terrible, therefore, the brave man simply chooses what he knows to be good. But to choose the good knowing it to be such, is to exercise wisdom. Courage is thus only another name for wisdom; and the Sophist, who has declared again and again that wisdom is the chief of all the virtues, handsomely owns himself beaten, and ends by telling Socrates that he always maintained that he was a promising youth, with whom he gladly conversed, and that he would not be greatly surprised if he were one day to acquire some reputation for wisdom.

The views entertained by Socrates on the relation of virtue to what are commonly regarded as its component parts, as exhibited in this and other parts of Plato's dialogues, may be thus summed up: Virtue is not an aggregate of separate elements, neither is it a generic term for objects resembling each other only in their common participation in one single element, however important; and when we speak of the virtues, distinguishing them into courage, temperance, piety, and the like, we do not mention the parts of a divisible whole (*e.g.*, of a lump of gold), but the different phases in which an indivisible whole (the quality of gold) exhibits itself.

The Aristotelian doctrine that the soul is all in the whole, and all in every part,<sup>1</sup> finds its precise analogue in the case of virtue: it is all in the sum and all in each of the virtues. There can be no justice without temperance, nor temperance without justice, nor piety without both justice and temperance, &c. Each virtue involves every other and all the others; and in exhibiting itself, it exhibits not itself alone, but virtue, the good (τὸ ἀγαθόν), the idea, one and indivisible, and it is thus that we arrive at a philosophical explanation of the dictum that "he who hath sinned against one part hath broken the whole law,"<sup>2</sup> which, as Thomas Aquinas has remarked, finds its counterpart in Cicero's saying in the Tusculan questions, "Si unam virtutem confessus es te non habere, nullam necesse est te habiturum."<sup>3</sup> It was on the same principle that the Gnostics maintained that each of the Divine attributes presents the whole essence of Divinity under one particular aspect, and may thus appropriately be called God.<sup>4</sup> Thus, then, we perceive the ground on which, according to Plato, charity and mercy fall within the sphere of justice, and, following out his views, when we speak of justice as embracing the whole field of ethics, we regard it as corresponding to that phase of the good in which it exhibits itself as a harmony in human relations. Even when we quit this phase, the essential wholeness of the good necessitates the presence of justice in the other phases of its manifestation. Adoration is nothing more than a just recognition of the Divine perfections, for whatever indulgence our helplessness may require of God, He can re-

<sup>1</sup> Hamilton's *Lectures*, vol. ii. p. 9.

<sup>2</sup> Rom. xiii. 8; Gal. vi. 2.

<sup>3</sup> *Prim. Sec.*, quæes. lxxv. art 1.

<sup>4</sup> Neander, vol. ii. p. 11.

quire none from us. If we could satisfy His justice, He would be satisfied. Even the sphere of the intellect by no means excludes the good or its manifestations in the form of justice. Not only the speech of philosophers, but the language of Greece itself coupled the beautiful and the good. In our own country, Price and Wollaston and others have identified truth with justice, and we have the highest of all authority for joining truth to righteousness. Truth is to knowing what righteousness is to doing. If righteousness consist in acting or suffering, truth consists in knowing or thinking, in accordance with justice.<sup>1</sup> Even popular speech marks the coincidence. When a Frenchman wishes to say that a thing is true, he says, *C'est juste*. And in like manner beauty—art—which is truth presented to the senses, “the divine made visible,” as Hegel finely said—resolves itself into justice in proportion and colour. Moreover, truth resembles virtue in this, that it is not a mere aggregate of separate and unconnected truths, a vast and ever-swelling mass of inorganic fact, falling now within and now without the pale of what may be called intellectual justice. On the contrary, it is one and the same quality of rectitude, exhibiting itself in numberless instances, unveiling itself in manifold aspects. Every fresh discovery is simply an additional revelation of the cosmic relations of the special department of the universe to which it belongs: it is a revelation, not of truth which differs from, but of truth which harmonizes with, nay, the moment it is discovered, is felt

<sup>1</sup> The one is the *ἠθικὴ ἀρετή*, the other the *διανοητικὴ ἀρετή* of Aristotle.



to be inseparably and indissolubly allied to all that was known to be truth before. If it were not felt and seen to be so, we should have in that single fact a certain proof either that the new truth was no truth, but rather a contradiction of truth, or that the old truth must be dismissed as an exploded error.

Were I to attempt to enumerate all the errors, theoretical and practical, into which mankind have been led by the narrow and unworthy view of justice in its relation to the other virtues, and the consequent distinction between perfect and imperfect obligations, against which I have here contended, I should have to travel through every department of science which is occupied with the relations either of man to man, or of man to God. To point out the effect of these errors on the development of jurisprudence as a science will form one of my chief objects in the concluding chapters of this treatise; and in our studies of positive law there is no department in which we shall not come upon numberless illustrations either of the practical repudiation of the negative doctrine, or of the disastrous consequences of its application. As illustrations of the former, I have mentioned the laws which, in all municipal codes, impose duties on the potent towards the impotent members of the community, whether that impotence arises from age, from imbecility, or from poverty; and as an illustration of the latter, the unworthy conception of international duty which so often leads neighbouring states in the presence of war, which they might have prevented or which they might terminate, to accept neutrality as their normal attitude.

Another illustration, which will readily occur to Scotch lawyers, is to be seen in the false distinction between law and equity, which, for many generations, has given so confused and unscientific a character to the municipal jurisprudence of our English fellow-countrymen.

## BOOK II.

OF THE OBJECTS OF NATURAL LAW, AND  
JURISPRUDENCE IN GENERAL



## CHAPTER I.

### OF THE RELATION BETWEEN JURISPRUDENCE AND ETHICS.

ASSUMING, for the present, that the inseparable relation between jurisprudence and ethics has been sufficiently demonstrated, let us now inquire somewhat more closely into the character of that relation.

*The relation which subsists between jurisprudence and, as a necessary consequence, between natural law and ethics, is determined by the definition of the objects of jurisprudence and of natural law, ultimate and proximate.*

(a) *The ultimate object of jurisprudence is the realization of the idea in the ideal<sup>1</sup> of humanity, the attainment of human perfection (Vollkommenheit), and this object is identical with the object of ethics when regarded exclusively as a human science.*

(b) *The proximate object of jurisprudence, the object which it seeks as a separate science, is liberty. But liberty, being the perfect relation between human beings, becomes a means towards the realization of their perfection as human beings. Hence jurisprudence, in realizing its special or proximate object, becomes a*

<sup>1</sup> The *idea* is the conception (*Urbegriff*), and the *ideal* the thing conceived (*Urbild*); the former is abstract, the latter concrete.



*means towards the realization of the ultimate object which it has in common with ethics.*

In conformity with the limited scheme which the character of this work imposes on me, I terminated, in last chapter, the consideration of the sources of jurisprudence—of the teaching of nature with reference to human relations,—and, in their primary aspect, of the laws or principles of jurisprudence which result from this teaching. My chief object in the discussions into which this portion of our subject has led us, has been to exhibit the inseparable relation, not only between natural law and positive human law in all its branches, but between the science of jurisprudence as a whole, embracing both natural and positive law, and that still wider and more general science which comprehends all the other human sciences, and assigns to them one final end—I mean the science of ethics<sup>1</sup> in its widest human sense—that is to say, in the sense of the science of human life and of human progress, social and individual.

It now becomes my duty to point out, if possible more explicitly than I have done hitherto, the characteristics which distinguish that particular human science with which we are occupied from this all-embracing science, and from the cognate branches which grow with it on the same parent-tree. In addressing myself to this task, I pass from the sources and genesis to the sphere and objects of the science of jurisprudence.

From the whole view which we have taken of the nature of

<sup>1</sup> I have here attached to ethics the sense advocated by Krause, p. 40, Ahrens, pp. 123 and 136, and which is generally attached to it by later German writers. —See Warnkönig, *Encyc.*, p. 7.

our rights, and of the manner in which our duties arise, the reader is of course prepared for the announcement that, in my view of the matter, the object of jurisprudence, in so far as it is a science separate from the great science of human life, may be embraced in a single word—a word dear and venerable to all men, but of all men most dear and venerable to us—Liberty. Jurisprudence, in its special capacity, does not profess to give us strength, knowledge, happiness, or virtue; but it professes to supply, or rather to vindicate, a condition<sup>1</sup> which is inseparable from the attainment of them all, and in which all the other conditions of their attainment are summed up—the free exercise of the powers which God has bestowed on us.

The root of all subsequent individual rights, liberty is the end and object of all citizen-duties.<sup>2</sup>

The relation in which jurisprudence stands to ethics is thus a subordinate one, the relation of species to genus;<sup>3</sup> whilst under the species again, as we shall see hereafter, are ranged as individuals the various departments of positive law. But though jurisprudence, embracing of course both natural and positive law, be subordinated to ethics on the ground that it professes to contribute to the perfection of humanity only in one direction, the contribution which it offers partakes of the full ethical character, so far as it goes. Liberty, the proximate object of jurisprudence, is perfection, absolute perfection,

<sup>1</sup> Krause, p. 47.—Das Recht soll die Bedingungen des Vernunftlebens herstellen.

<sup>2</sup> “There is,” says Kant, “but one congenital right—Freedom” (*Einleitung*, p. xlv.) “La fin de l’état,” says Spinoza, “est donc véritablement, la liberté” (i. p. 218). “Justice,” says Hegel, “is the reign of liberty realized.”—Ahrens, pp. 77-79, *passim*.

<sup>3</sup> Krause, p. 40.

ideal perfection, not in the beings or objects related, it is true, but in their relations to each other.<sup>1</sup>

Whether an absolutely perfect relation be realizable between imperfect beings may indeed be questioned, because one of the consequences of their imperfections will obviously be to hinder the realization of the relation, or to disturb it when realized. But a perfect relation, apart from the character of the objects related, is at any rate conceivable in the abstract, and with its attainment the ideal of jurisprudence, its object as a separate branch of science, is exhausted; whilst the function of positive law, or of jurisprudence as a practical art, consists in approximating to this perfect or ideal relation. If one man be a saint and another man a sinner, if one man be a sage and another man a simpleton, jurisprudence accepts them just as mathematics accepts numbers and spaces, and declares the relations in which they stand to each other; whilst positive law, taking the conditions of time and place into account, assigns to them the specific rights and responsibilities which relatively belong to them, prefers them and subordinates them, rewards them and punishes them, ranks them, in short, just as the engineer determines the greater weight which shall be laid on the stronger beam, or the accountant measures pecuniary relations by pounds and pence.

But though to jurisprudence, as such, the character of the objects with the relations of which it deals, is thus, formally

<sup>1</sup> Krause points out that law in general (*das Recht*) is not a thing in itself (*Wesen*), but a quality (*Eigenschaft*); and not an absolute quality, like virtue (*qualitas absoluta*), but a relative quality (*qualitas relativa*). Viewed as an adminicle of virtue, however, it assumes an absolute character, and becomes, in a subordinate sense, an *Eigenschaft*, as opposed to a *Verhältniss*. —Krause, pp. 29, 30.

so to speak, a matter of indifference, it is not less clear, on the other hand, that by perfecting their relations, jurisprudence tends, in a most important manner, to perfect the objects or persons related,<sup>1</sup> and that it thus acts as a means towards the attainment of the ultimate object of human existence—the end which it has in common with ethics. It is from failing to distinguish between the *relation* and the *objects related*, more, I believe, than from any other cause, that the difficulty of distinguishing between jurisprudence, and as a necessary consequence natural law, and ethics has arisen; whilst it is from failing to perceive the identity of their ultimate ends, that those who have distinguished them have so often fallen into the opposite and still more fatal error of separating them altogether, and almost of opposing them to each other.

But is liberty an object peculiar to the science of jurisprudence, and, above all, does it constitute a distinction between it and the science of ethics? Ethics too, it may be said, has liberty for its object; and this not as a means to some final and ultimate end, but as its own special end. Now there is a narrower sense than that in which I have used the term ethics—as identical with the science of human life as a

<sup>1</sup> Take, for example, the case of landlord and tenant. Is it not obvious that whilst the immediate object which law contemplates with reference to them is to perfect the relations in which they stand to each other, by giving free scope to the energies of each, this object, if attained, would have the effect of improving them as men and as citizens, and would thus contribute to the ultimate object in which law and ethics come together? This consideration furnishes, in my opinion, a sufficient answer to Professor Röder's allegation (*Neue Rechtsphilosophie in England*, p. 224) that, in retaining liberty as the object of jurisprudence, I separated law from ethics, and returned to the negative school of Kant. It was not in its end, but in its means that Kant's was a negative school.—*Infra*, p. 366, note.

whole—a sense in which the term has no doubt been used, both in the ancient and the modern world, and which unquestionably justifies this remark. To deliver the true, general, or normal nature of the individual from the restraints which his false, exceptional, or abnormal nature imposes upon it, was the professed object of the ancient moralists. Liberty, in this sense, is expressly stated by Epictetus to have been the end of his ethical system; and this end, variously understood, has been sought, more or less exclusively, by every subsequent moralist whose system had any practical drift at all. Recognizing this fact, it has been common with many<sup>1</sup> who have attempted to draw a line of demarcation between jurisprudence and ethics, to say that the one is concerned with external liberty and the other with internal liberty; or, in other words, that the object of jurisprudence is to deliver us from the restraints imposed on us by others, and the object of ethics to deliver us from the restraints which we impose upon ourselves.

Further, as the subjective impediments to liberty being self-imposed must be self-removed, ethics as a system, it has been said, consists of the rules by which each individual seeks to effect this object for himself—the “private ethics” of Bentham; whereas jurisprudence consists of the rules by which he protects himself, or is protected by others, from impediments from without. In this view of the matter ethics stands to jurisprudence pretty much in the relation in which municipal law stands to international law. As municipal law governs the internal, and international law the external re-

<sup>1</sup> Kant, *Semple*, p. 175.



lations of the state, so ethics governs the internal, and jurisprudence the external relations of the individual. But, viewed in this light, it is plain that ethics, in place of being a wider and more general science with an ulterior end of its own, becomes neither more nor less than a branch of the science of jurisprudence, and a branch which, the moment that it is embraced as part of the teaching of a particular sect, whether philosophical or religious, assumes the character of positive law. It is a system of law differing from other systems in the domain which it governs and the tribunals by which it is enforced, but having essentially the same objects—the attainment not of perfection directly, not of the final end of life in itself, but of freedom as a means to that end, or of order, which, as we shall see presently, is a means to freedom. Systems of rules of this description have often been devised, their object being to give freedom to the normal impulses of humanity within the subjective domain; and to these systems the character of positive law has been recognized as belonging, not by implication merely, but expressly. It was of such a system that Epictetus said, “Whatever directions are given you, look upon them as so many laws, which have binding power, and such as you cannot without impiety depart from.”<sup>1</sup>

Now, if there be anything to be gained by confining to systems of this particular class the term ethics, and inventing another term for the general science under which all systems for the government of human action fall, and which assign to them their common end, I have no objection to that proceeding. But I object to the ethical character, however we may

<sup>1</sup> Stanhope's trans.

choose to designate it, being arrogated to themselves by these subjective systems, whilst the other co-ordinate systems, which deal more prominently with external liberty, are handed over to the science of jurisprudence, as if these two sciences were reciprocally exclusive, and covered territories the confines of one of which commenced only where those of the other terminated. The laws which govern the relation of citizen to citizen, of state to citizen, and of state to state, are ethical laws, because their ultimate end is perfection, just as much as the ἀνέχου καὶ ἀπέχου, the *sustine et abstine*, or any other rule for the guidance of individual conduct.

And as ethics embraces the whole field of jurisprudence, so there is no portion of the domain of ethics from which the ministration of jurisprudence, by its own special means—the attainment of liberty through the instrumentality of order—is necessarily or scientifically excluded. It may be that the state can give little aid to the individual in applying or enforcing the rules by which his own liberty demands that his conduct should be regulated. In the higher races of mankind, at all events, personal activity and industry, whether bodily or mental, can be but little stimulated by social appliances; and these, in the normal conditions of life, are called forth most effectually by the compulsors of necessity, and the inducements of wellbeing. But, even in free states, labour is made a condition wherever public charity is bestowed on the able-bodied; and education, the search after and dissemination of truth, as opposed to the acceptance of dogma, is enforced by the policy of the most advanced states in Europe. Then take the negative virtue of temperance. It may be impossible to

enforce it by positive law. That is a question of fact relative to which there is much difference of opinion; and according as we decide it affirmatively or negatively, will be our view as to the expediency or in expediency of enactments having the enforcement of temperance for their object. To interfere with the use of God's gifts is an interference with liberty, and the question as to the limits of use and abuse is one which the community may possibly be incompetent to solve by any general rule. But suppose those limits passed, interference to prevent a repetition of the offence, assuming prevention to be possible, would be an interference in favour of the liberty of the victim of intemperance, and consequently in accordance with the principles of jurisprudence. Nay, very possibly it might be an interference in accordance with his wishes, for there seem to be cases where men (individually or collectively) say, "I am weak and wish to be protected against my own weakness. I should be glad of a law which made it more difficult for me than is now the case, to gratify my inclinations in the direction of wrongful indulgence." Or, again, the reformation of the individual offender may or may not be attainable by means of punishment; but nobody doubts that it may be legitimately sought by that means, and that here too, even positive law may come, if it can, to the aid of those ethical rules by which the subjective domain is more ordinarily governed. The object of our study of natural law is wholly mistaken when it is said to be to define the sphere of jurisprudence, meaning thereby positive law. That sphere can be defined only by a study of the conditions of time and place in which its definition is sought. It belongs to national

politics. But natural law gives the direction, though it does not assign the limits of positive law.

There is another ground, analogous to that I have just mentioned, on which an attempt has been made to distinguish the sphere of jurisprudence from that of ethics. It is said that it takes cognizance of actions alone, not of thoughts, opinions, or intentions: that it will neither vindicate for me the power of thinking freely, nor protect you against such evil and malicious thoughts as I may harbour against you. But here, just as in the case of the subjective domain generally, the exclusion of jurisprudence arises from practical rather than theoretical considerations. On the one hand it is scarcely possible to imagine circumstances which would call for its interposition, for, inasmuch as there is, and can be, no restraint on internal liberty, interference with mere thought and opinion can consequently never be requisite on the ground of removing such restraint. On the other hand it is equally difficult to imagine circumstances in which interference would be possible. So long as thought or opinion remains within the breast—so long, that is to say, as it is mere thought or mere opinion—neither its character nor its existence can be ascertained, and consequently it cannot be put into the crucible of human judgment. But the limits of jurisprudence in this direction are fixed, not by principle, but by necessity; for the moment that its interference becomes possible, it is conceivable (though still perhaps very unlikely) that it may be justified in the name of liberty. That *indirectly* such interference not only may, but must take place, unless the State is to abdicate its highest func-

tions, is obvious.<sup>1</sup> The existence of the Church and the School are sufficient examples; and it is remarkable that Dissenters who are most zealous for the separation of Church and State are precisely those who are most zealous for the union of Church and School. Nor is the principle that the quality of thoughts, as good or evil, or of opinions, as true or false, is indifferent to jurisprudence, that on which its interference for the most part is withheld till the thought finds expression in an act, or the opinion is propagated in the form of a doctrine which the Church or the State conceives to be dangerous to wellbeing. So far from repudiating all ethical considerations, the ground on which jurisprudence declines to interfere is that, being bound to interfere on ethical considerations alone, it possesses, and in the circumstances can possess, no ethical information. Jurisprudence does not say that it will take no cognizance of the quality of intentions, for it is on the judgment which it forms of the motives of the agents that the whole doctrines of responsibility and non-responsibility rests. The moment that the intention of the agent is made manifest (as, for example, by an attempt to commit a crime, by the writing of a threatening letter, the equipment of a ship of war by a neutral, a charter-party binding a ship to run a blockade, or the like) jurisprudence will anticipate the encroachment on external liberty which the actual perpetration of crime would occasion, and not only constrain the will of the intending criminal, but punish him for his evil purpose.<sup>2</sup>

<sup>1</sup> Krause, p. 64.

<sup>2</sup> When Kant observes, then, that "the coincidence of an action with the law,



From these observations, I think, you will perceive the relations in which the science of jurisprudence, as a whole, stands to the science of ethics, in the wider sense. It is, as I said at the outset, that of a special to a general science, of a means to an end; for if the end of jurisprudence be liberty, liberty itself is manifestly desirable only with a view to the attainment of other objects, of which the sum is the realization of that perfect *human* development, and consequent happiness, which is the end of the science of human life as a whole, the human end in itself. The two sciences, as I have all along said, are co-extensive; their final ends are the same, for *natural*<sup>1</sup> law seeks perfection by the fulfilment of the duties of charity, benevolence, and the other so-called imperfect obligations, just as it does by the vindication of the so-called perfect obligation of justice—the question of how far its dicta may be enforced by *positive* law,—its “sphere,” in Austin’s sense—being a question of facts and circumstances of temporary expediency.

But jurisprudence is not the only special science which

*abstracted from any regard had to the motive* whence it sprang, is its legality; but such coincidence—when the idea of duty, founded on the law, is at the same time the inward spring—forms its *morality*,” I deny the validity of the opposition. The motive, so far from being “abstracted from,” is often the very essence of the legality or illegality of an act. Shooting, in the abstract, is legal. Shooting with intent to kill a man, unless it be in self-defence, or for the protection of our country, is illegal. Enlisting is legal and commendable; enlisting “with the *intent* to serve against the Queen’s allies” is a violation of the Foreign Enlistment Act. Whether it be wise to frame enactments, the enforcement of which depends on a proof of “intention,” is a practical question with which we have here, happily, nothing to do.

<sup>1</sup> As to the limited sense in which the word “natural” is used with reference to jurisprudence, see Introduction, *ante*, p. 2.

seeks the final end of life ; nor does it stand to the other sciences which seek it by different means, in any other than a co-ordinate relation. Neither from the common science of ethics then, which has for its function to assign their common end to all the human sciences, nor from these sciences specially considered, each of which, though employing partial means, seeks the attainment of perfection not partially but completely, is the science of jurisprudence distinguishable as regards its domain. Each science, by its own special means, seeks the realization of all the virtues. The science of instruction, for example, seeks the attainment of the good by the inculcation of the so-called imperfect obligation of charity, just as of the perfect obligation of honesty, or of the duty of cultivating the reason, which is its more special end. The sciences of war and of diplomacy seek to maintain our honour,<sup>1</sup> and to fulfil our human destiny, as well as to protect our more immediate interests as a nation. And so of each of the others. Each seeks, in so far as its means permit, to cover, so to speak, the whole ethical field, to fulfil the whole law. But each is distinguishable, first, from the general science of ethics, inasmuch as being special and practical sciences they employ special and practical means for the attainment of the common object ; and, second, from each other, inasmuch as the means which they employ are different. Now it is the *means* employed by the science of jurisprudence for the attainment of the common end which constitutes its object considered as a separate science ; and the means which jurisprudence supplies for this purpose is liberty, just as the means which education supplies is

<sup>1</sup> " Peace with honour ! "

knowledge, or the means which medicine supplies is health, or the means which war supplies, or professes to supply is peace.<sup>1</sup>

In further illustration of the relation in which the various sciences stand to the central science of ethics, and to each other, let me recall the results of our recent inquiry into the antique conception of virtue. After endeavouring to prove the groundlessness, in point of principle, of the distinction which it had been attempted to draw between justice and charity, I referred to the famous argument in the *Protagoras* of Plato, by which the unity of the virtues is established. According to Plato's view, we found that virtue, the good, when considered as a whole, is not an aggregate of separate elements, neither is it a generic term for specific objects resembling each other only in their common participation in one single element, and that when we speak of the separate virtues of courage, temperance, justice, and the like, we do not mention the parts of a whole—*e.g.*, of a lump of gold—but the different phases in which an indivisible whole—the *quality gold* in the abstract—exhibits itself. As Aristotle said of the soul, "that it is all in the whole, and all in every part;" and as Hamilton, adopting his view, held that it is the same individual mind that operates in sense, in imagination, in memory, in

<sup>1</sup> The relation in which the position here taken up places us to the Kantian school, may be thus stated:—

1st, In accordance with the Kantian School, we adopt—

(a) Liberty as the object or end (*τέλος*) of jurisprudence, and

(b) Order (*infra*, cap. ii. p. 367) as the means, *sine quâ non*, to the attainment of liberty.

2d, In opposition to the Kantian school we reject (Book I. cap. xi. p. 281, *passim*; see specially 294 *et seq.*) the negative character which it imposes on the means by which jurisprudence seeks the attainment of its end, following, in this latter respect, the teaching of the positive school.—*Ante*, pp. 355, 357.

reasoning, &c.—differently indeed, but differently only because operating in different directions; so of virtue we conclude it is all in the sum, and all in each of its parts. But, like the mental faculties, the impulses which correspond to the various virtues operate in different directions; they seek a common end by different means. Now it is to the means employed by the virtues, thus separately regarded, that the various branches of human endeavour, with a view to the realization of the good, correspond; and these branches, when systematized and reduced to rule, constitute the various human sciences. But the various human sciences when applied to practice—that is to say, when brought in contact with external existence—become arts and professions, all bound together by one ultimate and general object—the realization of the good, or of the human idea, which is the good in its human aspect,—and all held apart by their various proximate and special objects, the realization of which they seek as separate professions.

## CHAPTER II.

### OF THE RELATION BETWEEN ORDER AND LIBERTY.

Having accepted liberty as the object of jurisprudence as a separate science, we must now endeavour to determine the character of liberty. With this view, two inquiries seem specially to press themselves on our attention: 1st, In what

relation does liberty stand to order, to which it is often opposed? 2d, In what relation does it stand to equality, with which it is often identified? It is the first of these inquiries which will occupy us in the present chapter.

*Order and liberty, like justice and charity, are in principle identical. They can be realized only in conjunction, and necessarily culminate together.*

It was not without reason that our own ancestors, in word and deed, coupled liberty with law; that the sacred writers spoke of the "perfect law of liberty" as the law prescribed by Him whose "service is perfect freedom;" or that Cicero said, as Plato had said before him, "*legum idcirco omnes servi sumus ut liberi esse possimus.*"<sup>1</sup>

But the conditions under which our rights are realized, rather than the origin of these rights, or the final end of their exercise, being the subjects with which jurisprudence, when seen not as a science but as an art, is mainly conversant,—the realization of order, and not the attainment of liberty, came very generally to be regarded as the final and exclusive object of jurisprudence. The error, like most errors, was a half-truth; for the condition—the means which was thus mistaken for the end—being not one of many conditions or means, but the condition *sine quâ non*, the exclusive and infallible means—the means without which the end was, in all cases, unattainable, and with which its attainment was inevitable—this means, if not identical with the end, was involved in it, and in the last analysis implied in it. If you analyse liberty you will find order, just as if you analyse order

<sup>1</sup> *Pro. Cl.*, 5, 3.



you will find liberty. Perfect order is liberty ; perfect liberty is order. But the practical results of the error have not been on this account less fatal ; for it has been by considering order as an end in itself, and by forgetting that its value ceases the moment that it fails to fulfil the function of a means towards the attainment of liberty, that authority has been hardened into despotism, that obedience has degenerated into slavery, that nation has been separated from nation, class from class, and man from man, till humanity itself has groaned under the burden which was bound on its back by honest and upright, but ignorant hands. The principle that the perfection of legislative, as of all other machinery, consists in its simplicity, and that so soon as a law becomes needless it becomes injurious,—a stumbling-stone in the way to liberty, an impediment in our progress towards the realization of the final end of life,—was the great discovery of the eighteenth century.

As usual, this principle received a one-sided application. Theoretically, as we have seen, it led even men like Kant so to limit the sphere of legislation as to lose sight of its positive side ; and this error speedily opened the door to the still more formidable conclusion that the negative side of it must be repudiated also. Order, which feudalism and despotism had adopted and discredited as an end, under the reaction which arose against them, lost its hold as a means, and its opposite—license—no longer stigmatized as the irreconcilable foe of liberty, was tolerated as its excess, and hailed as a rougher and more perilous, but shorter road to the goal of human life. Now, if license and liberty differ only in degree, and if order, as the opposite of license, be thus separated from liberty, it

will at once be apparent that there is an end to compulsory legislation altogether. The "police" of the negative shares the fate of the "guardianship" of the positive school; for order having confessedly no separate standing-ground, no independent warrant of its own, it is in the name of liberty alone, his own included, that the greatest criminal can be punished for the greatest crime. The only answer, then, to a train of reasoning which has led to far graver results than even the substitution of order for liberty, consists in the denial that license ever is liberty in excess, or can, in any circumstances, stand to it in the relation even of a condition. License, on the contrary, is the condition of despotism, and the condition of despotism *sine quâ non*; for it is over a licentious community alone that a despot can rule: and when a community becomes licentious, the despot will not be far to seek.

We often hear, in popular speech, of the exaggeration of a truth, or of a virtue; but as Cousin<sup>1</sup> and many other reasoners have pointed out, no such exaggeration is possible. Liberty, like truth and virtue, never can be carried too far. What really takes place, in the circumstances which these phrases describe, is not an exaggeration but a transition; and a transition very often to error or vice of the gravest kind, though on the principle that extremes meet—to error or vice which lies on the very borders of truth and virtue.<sup>2</sup> That license, then, stands to liberty in the relation, if not directly of an

<sup>1</sup> *Ecol. Ecos.*, p. 297.

<sup>2</sup> The doctrine of the *μεσότης* is explained by Sir Alex. Grant in such a way as to free Aristotle from the reproach which Kant and Grotius, and so many others, have brought against him, of making the distinction between virtue and vice merely quantitative.—Grant's *Aristotle*, vol. i. p. 201.

opposite, at least of the necessary condition of the presence of its opposite, and is practically equivalent, not to its more perfect, but to its less perfect realization *on the whole*, or, as Kant would say, "as an universal law," will, I think, be apparent if we consider that, in every imaginable instance, it is resolvable into a pushing of the *meum* into the domain of the *tuum*, or the reverse. There can be thus no general or absolute gain; for, assuming the subject to be a gainer, in direct proportion to what the subject gains the object loses. But why, it may be said, should there be an absolute loss? Now the answer to this question will be found in recalling the fact that man is a dependent being, the full possession and enjoyment of whose gifts, powers, and faculties is possible only by the aid of the highest possible realization of objective means. Subjective liberty is something more than the mere negation of objective restraint. It is only by the help, the active aid and co-operation, of the object that the subject can be free; and were I to succeed, not only in robbing you of your liberty, but in annihilating the whole objective world, I should be more limited by my own impotence, more enslaved by myself, than I could possibly be by its encroachments. The fraternal relations of humanity, as realized in association, co-operation, combination, and the like, are favourite themes at present, chiefly with those by whom the deeper principle of mutual aid in the paternal direction of guardianship as a means to the attainment of liberty has been forgotten. But the successful, or even the safe application of the fraternal principle, must depend on our recognition of the fact that, so far from being at variance with the principle of

order which has been falsely associated with the paternal principle exclusively, true fraternity is only order in another aspect. Seen in this light, and recognized, like order on the whole, not as an end but as a means, fraternity, like guardianship, rests on the great truth that, as God has made nothing in vain, and that there is no creature, however insignificant or comparatively unimportant, the free and perfect exercise of whose faculties is not demanded for the realization of the freedom of every other; whilst the converse of the proposition is likewise true—viz., that there is no created being, or collection of beings, so self-supporting as to dispense, without loss of liberty, with the aid of any being that God has made. It is, then, the maximum, and not the minimum, of objective, which is the condition of the attainment of the highest subjective liberty. But a maximum of objective liberty, combined with a maximum of subjective liberty, is possible only in the case in which neither oversteps its legitimate boundaries. There must be no debateable ground of anarchy between them, else one or both will fall below the maximum. But the arrangement by which their respective borders are defined, as it were, by an ideal line, which robs neither of its territory, is the arrangement to which I give the name of *order*; and I think, therefore, that the conclusion is warranted that the highest liberty involves the most perfect order, and, reciprocally, the highest order the most perfect liberty.

One of the most important consequences of the interdependence of order and liberty, is the impossibility of either progress or retrogression taking place in the one apart from the other. Nothing can be more misleading than to talk of order

as the permanent, and liberty as the progressive element in society, as if order resembled the mechanical arrangement of bricks in a wall, and liberty the organic development of a plant or an animal, whereas they are, in truth, the complementary functions of one single organism, the cells and the sap of one living body. So dependent, indeed, are they on each other, that the exclusive triumph or failure of either would be the annihilation of both. Nor is this relation in any degree affected by the fact that, in progressive societies, order, as we have said, becomes more and more spontaneous, and less and less dependent for its maintenance on positive law; for it is in voluntary obedience, in free acceptance of law, and not in compulsion, however perfect, that order culminates. A self-acting machine is not the negation, but the perfection of mechanism; and so an autonomous community is not a community set free from order, but a community which freely orders itself. For this reason, paradoxical as it may seem, it nevertheless admits of demonstration, that if a perfect republic were realized, it would be more anti-democratic, in the popular sense of democracy, than the most despotic government that ever existed—nay, than any government that ever existed, or could possibly exist, on the face of the earth.

The inseparable connection between order and liberty did not escape Socrates, as few things did. Plato represents him as illustrating it, in a passage in the *Gorgias*, in a very ingenious and characteristic manner. "Order, system, regularity," he says,<sup>1</sup> "are the only conditions of wellbeing in a house, and in a ship. To this same order and regularity in

<sup>1</sup> Cap. 59.



the body we give the name of health. But health is the condition of liberty in the body; for even the physicians allow the healthy body the fullest gratification of its desires, whereas the moment it becomes sick, the only mode in which it can be cured is by restraining it and interfering with its liberty. But to the order and regularity of the soul, that which corresponds to bodily health, we give the name of law (*νομός*), which is righteousness and temperance (*δικαιοσύνη τὴ καὶ σωφροσύνη*, which he elsewhere<sup>1</sup> combines under *κόσμος*). And in the soul, precisely as in the body, whilst the healthy soul fulfils its longings without injury, the diseased soul—that is to say, the soul that is irrational, and intemperate, and unjust, and unholy—in order to its own restoration to health, must be restrained in its desires.” “Nor, even if present gratification be regarded as the end, is it attainable through license; for what gratification does an unhealthy body derive from the fulfilment of its desires?”<sup>2</sup> and the case of the soul is again analogous. It is in this latter point of view that the analogies derived from our bodily functions present to us, in the strongest light, the universal antagonism between license and liberty, and the self-destructive character of the former. Even before the physician can interpose, the limitations which he would have suggested are but too often effected by the unimpeded action of the indulgence itself; and, without the slightest external interference, the point is reached at which it is appointed by the constitution of our nature that “the grasshopper shall become a burden, and desire shall cease.”<sup>3</sup>

<sup>1</sup> Cap. 63.<sup>2</sup> Cap. 59.<sup>3</sup> Eccles. xii. 5.

## CHAPTER III.

OF THE HISTORY OF THE DOCTRINE THAT THE IDEA OF LIBERTY  
INVOLVES THE IDEA OF ABSOLUTE EQUALITY.

Before we quit the consideration of liberty as the object of law, there is one question in particular which demands our attention, because the notion which we form both of liberty itself, and of those special and proximate objects which are in reality means towards its attainment, will largely depend on the answer which we give to it. The question to which I refer is whether Equality, which common sentiment and vulgar speech have now, for nearly a century, so frequently connected and even identified with liberty, be really implied in it; and if so, in what sense?

In addition to the scientific importance which must always belong to it, this question is, moreover, that of all others which has perhaps the most important bearing on the practical life of our time, both social and political. However much the better sort of Englishmen may be satisfied of the practical impediments which stand, for the present, in the way of the attainment of social and political equality, in the popular sense, either in England or anywhere else—nay, however fully they may be convinced of the impropriety of its admission amongst the immediate objects of any scheme of legislation, or system of positive law, in any stage of development which mankind has yet reached, there are, in many honest minds,

hazy notions about its absolute justice and ultimate expediency, which cause them to hesitate in dismissing it from the objects of jurisprudence on absolute grounds. They shrink from the consequences which it has involved hitherto, and which apparently it must always involve; and yet, as they can see no logical or scientific escape from it, they arrive at the untenable, irrational, and absurd conclusion, that though wrong in practice it must be right in theory. And it so chances that, if in some degree protected by their national temperament against the extremest practical consequences of the doctrine of equality, Englishmen stand to it, logically, in a peculiarly helpless position. The historical method is the only one with which the vast majority even of educated men in this country are acquainted, or in which they have any confidence, and here the inadequacy of the historical method, either as a refuge against error or as a basis for truth, has become specially apparent. It is true that history repudiates equality; that the life of man, hitherto, has failed to realize it; and that these facts are good arguments, so far, against its claim both to scientific and practical recognition. But they only go a certain length. They are grounds of hesitation, not of decision. The life of man is not ended; history has not closed; and the verdict of history is thus neither final nor infallible. It may be that the future will turn its back on the past—nay, it is possible that a contemporaneous history may be growing up, in America or elsewhere, even now, which shall reverse the previous history of mankind. On these and similar grounds, the logical and formal validity of which it is impossible to deny, and the material truth of

which we may question but cannot absolutely refute, the historical method has been repudiated by speculative politicians, from the days of Hobbes to our own. The enemies of historical society have appealed from tradition to nature, from empiricism to science. The appeal is legitimate; and those of us who undertake the defence of society must be contented to follow them into this court of last resort. My own acceptance of the challenge is the more imperative, because the method on which political scepticism here relies is that which I have all along invoked as the only means of reconciling liberty and order, and placing society on an immovable basis of reason. Nor is it the acceptance of the philosophical method as at least co-ordinate with the historical which alone imposes on me this duty. To many the acceptance of the *de facto* principle, as the result of this method, and the basis of its practical application, has seemed to create a conflict between my speculative premises and my practical conclusions. I have been told that whilst my principles led me to be a Radical, my instincts made me a Conservative, and that, in the long-run, I follow my instincts and not my principles. I am myself persuaded that, however often they may have led to other conclusions, the truest and only true conservatism results from the study of nature, and from the positions which that study logically yields.

Without withdrawing, then, from the position which we have hitherto occupied, I shall endeavour to develop a theory of equality in accordance with nature, which, however much it may differ from the popular ideal, will, I trust, satisfy the utmost longings of scientific liberalism. But before I present

the doctrine which seems to me, logically and necessarily, to result from the principles of nature which we have already recognized, it may be proper that I should endeavour to indicate, historically, the origin and development of the opposite view. "To trace an error to its fountain-head," said Lord Coke, "is to refute it;" and Mr Bentham shrewdly remarked that, "with many understandings it is the only refutation that has any weight."<sup>1</sup>

(a) *As a protest against authority.*

As a mere protest against authority, the doctrine of absolute equality is as old as mankind. It is the *contre-coup* with which vanity and envy respond to insolence and oppression, and by which one class of vices counteracts another. In this sense it has found expression in every servile war, in every agrarian outrage, in every act of insubordination which exceeded the bounds of a legitimate protest against tyranny or exclusiveness. But it is not in the spirit in which it was acted upon on these occasions that the principle is vindicated by its advocates. It is viewed not as a watchword of temporary dissatisfaction, whether justifiable or unjustifiable, but as the permanent goal of social and political effort.

(b) *By the Jesuits.*

As advocates of the supremacy of the clerical order, and defenders of tyrannicide, several of the Jesuits of the sixteenth century,<sup>2</sup> following in the footsteps of Hildebrand in the

<sup>1</sup> Stewart's *Works*, vol. i. p. 192.

<sup>2</sup> Hallam, *Literature*, vol. ii. p. 33 *et seq.* Ranke's *History of the Popes*, vol. ii. p. 7 *et seq.* See Suarez's theory, as stated by Hallam *ut sup.*, p. 524. He was disputing, however, against the patriarchal theory, and not for democracy.



eleventh,<sup>1</sup> came so close on the development of a theory of political equality as to justify the assertion of Bunsen<sup>2</sup> that "Jesuitism and radicalism are two several masks of the same destroying spirit." Of the alliance between ultramontaniam and revolution, the black and the red international, the history of our own day, and even of our own country, furnishes many examples. But the alliance is essentially dishonest, as is apparent from the fact that within the Church itself the strictest system of subordination was maintained,<sup>3</sup> and it has never produced any consistent theory of mutual aspiration.<sup>4</sup> The same may be said of the Protestant aspirations after equality which sprang out of Luther's teaching, misunderstood, and found expression in the sayings and doings of Thomas Munzer and John of Leyden, and realization in the Bauernkrieg. Henry Marten, in Cromwell's time, unlike Sidney, Vane, &c., was a communist and a republican.<sup>5</sup>

(c) *By Hobbes.*

The earliest systematic statement of the doctrine that can be said to influence existing opinion is that of Hobbes. Hobbes brings equality within the sphere of justice, by bring-

<sup>1</sup> Neander, vii. p. 119.

<sup>2</sup> *Life*, ii. p. 149.

<sup>3</sup> Neander, vii. p. 120.

<sup>4</sup> The relations between Calvinism and democracy are excellently brought out in "Les Français en Amérique pendant la Guerre de l'Indépendance (p. 29 *et seq.*), par Thomas Balch," an American gentleman, who for many years resided in France, and was a careful student of political philosophy. That these relations have been, practically, of the most important kind, cannot be doubted. But I am not aware that any doctrine of absolute equality, as the ideal relation of human beings, was ever enunciated by any leading Calvinist. Equality, even amongst the clergy, was no part of the original scheme of Knox; and Calvin's system was borrowed from, not the cause of, the republican constitution which, in imitation of the rest of Switzerland, Geneva had already adopted.

<sup>5</sup> *Life of Algernon Sidney*, by Ewald, p. 189.

ing it first within the sphere of fact. He does not argue that all men ought to be equal, or to be made equal, by social or political arrangements, in obedience to any law either human or divine; but he boldly asserts that all men are equal absolutely, in strength, wisdom, and virtue; and this not at birth alone, but throughout life, not by their own arrangement, but by the providence of God.<sup>1</sup> In perfect accordance with the principles which we have recognized throughout, it would follow from this single assertion, if true, that every distinction which has ever been established amongst men was an invasion of liberty, an act of injustice, and that the vindication of absolute equality, and its consequences, belongs to the science of jurisprudence, quite as inalienably as the vindication of liberty, with which it would indeed become identical. Mr Hallam has said that Hobbes adopted the "strange and indefensible paradox of the natural equality of mankind, rather in opposition to Aristotle's notion of a natural right in some men to govern, founded on their superior qualities, than because it was at all requisite for his own theory."<sup>2</sup> I cannot agree with Mr Hallam in that opinion. To me, on the contrary, it appears that the doctrine of equality formed the very corner-stone of Hobbes's whole political, and even of his ethical system; and that he was correct in supposing that his difference from Aristotle was necessitated by the conclusions which he had determined to reach. Essentially I regard it, of course, as an unstable foundation, because I believe the assertion to be false; but formally it was sufficient for its

<sup>1</sup> *De Corpore Politico*, cap. iv. sect. 1; *Leviathan*, cap. xiii. sect. 1, and cap. xv.

<sup>2</sup> *Lit. of Europe*, vol. ii. p. 538.

purpose as no other foundation could have been, and if the reader will permit me to assume its truth for a moment, I think I can show how Hobbes's whole political system, which was what he had most at heart, flowed from it.

The first effect of all men being equal in powers, was that all men were equal in rights ; for Hobbes, be it remembered, was fully alive to the necessity of founding jurisprudence in nature, and correctly held that rights are proportioned to powers.<sup>1</sup>

All men thus possessed an equal *right* to all things. There was no reason, either in fact or in law, why one man should give way to another. The earth, and the fulness thereof, was equally the inheritance of each, and each was as able as the other to hold his own. God had made no distribution of His gifts ; but had tossed them, so to speak, into the arena, to be scrambled for by combatants whom, in order that the fight might be interminable, He had endowed with equal powers. Here was surely a sufficient foundation for the doctrine of a state of *natural war*, and this, as is well known, formed the second stage in Hobbes's political structure. That the attainment of this second stage was the object with which Hobbes enunciated the doctrine of equality is a fact, of the reality of which a single glance at the beginning of the 13th chapter of the *Leviathan* will convince us, for he there lays it down expressly that "from equality proceeds diffidence—*i.e.*, mutual distrust—and from diffidence, war." But the very equality which rendered war inevitable and interminable, rendered its prosecution *detrimental* to every single individual. Reason and experience concurred in teaching that the only condition

<sup>1</sup> *Lev. pass.* and *De Cor. Pol.*, part i. cap. iv. sect. 14.

on which each could take exclusive possession of the fraction which fell to him when the sum of possessions was divided by the sum of possessors, was that he should renounce his claim to all the other fractions. In order to carry out this arrangement, to enforce this "covenant," as Hobbes and his followers were in the habit of calling it, government was necessary. But for government, as he terribly put it, the life of man would be "solitary, poor, nasty, brutish, and short."<sup>1</sup> It was for the common interest, moreover, that this arrangement should be carried out, not approximately, but absolutely,—the government must be absolute—*i.e.*, it must absorb the whole powers of the whole community, leaving no individuals, or society of individuals, in a condition to deal with it on better terms than the rest. In this way Hobbes arrived at the conclusion that, whatever the form of government might be, it must be absolute,—altogether uncontrolled in the exercise of its powers—despotic. The *Leviathan*, or mortal God, must share in the omnipotence of the immortal God whom he represented on earth. *Non est potestas super terram quæ comparetur ei*,<sup>2</sup> is the motto of his book, and he will not hear of a *practical* objection to this doctrine. His observations on the relative value of experience and reasoning are strangely at variance with the prevailing sentiment of our own day; but they are so characteristic of his vigorous way of thinking that I cannot resist the temptation of quoting a single sentence. "The greatest objection," he says, "is that of the practice."

<sup>1</sup> Cap. xiii.

<sup>2</sup> Job xli. 33. Let every one who would have a conception of the political aspirations of the first great and only logical apostle of equality, read and consider this tremendous chapter.

. . . "Howsoever, an argument from the practice of men that have not sifted to the bottom, and with exact reason weighed the causes and nature of commonwealths, and suffer daily the miseries which proceed from the ignorance thereof, is invalid. For though, in all places of the world, men should lay the foundation of their houses on the sand, it could not thence be inferred that so it ought to be. The skill of making and maintaining commonwealths consisteth in certain rules, as doth arithmetic and geometry ; not as tennis-play, on practice only."

But though a despotic government be possible under any one of the three simple forms of government enumerated by the ancients—monarchy, aristocracy, or democracy—the doctrine of equality pointed clearly to the first. For if all the radii of the circle being equal, each will reach the centre ; why, all the citizens of the state, being equal, should not all reach the throne ; and, conversely, the influences of the throne penetrate to each ?<sup>1</sup> The interposition of an assembly, council of responsible ministers, or the like, would, of course, have prevented this result. Moreover, as there were no natural differences amongst men, there could be no natural foundations for the various orders of society. Subordination of any kind was an evil, an injustice, to which free and equal citizens submitted only to the extent to which self-interest rendered it indispensable to each. The object of political science must be to reduce this evil to its minimum, by having the smallest possible number of superiors. The ideal government of Hobbes,

<sup>1</sup> Dante has a similar argument in favour of his "Monarch," who in other respects differs from the Leviathan pretty much as Ormuzd differs from Ahriman, and to whom the only objection seems to be the impossibility of finding him. —*De Monarchiâ*, lib. i. sect. xiii.



consequently, was *pure and absolute monarchy, and absolute centralization*. It was unquestionably the logical result of the arbitrary assumption of equality, on which he based his system; and as this result is known to have been a foregone conclusion with him, I am surprised that he did not press it home even more unhesitatingly than he has done, and on more absolute grounds, in the last instance. The only inconsistent part of his reasoning is, that he rests his argument in favour of absolute monarchy, as opposed to absolute aristocracy or democracy, on grounds of expediency, which, when speaking of the absolute character of governments generally, he had contemptuously repudiated. But it is very interesting and important, as illustrating the logic of facts, to observe that the experience of mankind has affirmed the conclusion of the shrewd old cynic of Malmesbury more emphatically than even he himself had ventured to do, differing, as that conclusion does, from those of almost all subsequent speculators who started from his premises. If there be one fact that history teaches more consistently and unequivocally than another it is this, that wherever an attempt has been made to realize the doctrine of equality, the result has been not democracy and local government, but first anarchy—that is to say, Hobbes's state of war—and then despotism and centralization. The crop which so often has been rashly sown by the democrat has invariably been reaped by the despot; and surely the despot has some claim to it, seeing that it was first introduced into the field of modern politics, not by the speculative republicans of the commonwealth, whose theories were opposed to it, nor by the

levellers of the commonwealth, who had no theories at all, and, like the communists of our own day, were merely criminals under another name, but by the grave and orderly tutor of Charles II., and the theoretical vindicator of the divine right of kings!

(d) *Spinoza.*

In tracing the history of this doctrine, the next great name we encounter is that of Spinoza. The mind of Spinoza was a very much finer one than that of Hobbes, and his metaphysical system, accordingly, is far subtler and more profound. Hobbes could never, by any possibility, have been the father of German pantheism. But in the matter with which we are concerned at present, there is reason to believe that Spinoza deceived both himself and his followers, which cannot be alleged against Hobbes.

Spinoza, too, was a believer in the doctrine of natural equality; but he differed from Hobbes in supposing that, in enunciating that belief, and insisting on its consequences, he was laying the foundation of free government. Though not without reluctance and occasional recalcitration, Spinoza, in so far as his political system was concerned, made the whole philosophical journey, up to the last stage, in company with Hobbes. Having accepted the doctrine of equality, he recognized in it, coupled with the facts of human depravity, the foundations of a state of natural war; and the ideas of justice, property, and the like, came thus to be dependent on the mutual agreement and consequent government by which alone this war was terminated. But Spinoza shrank from recognizing, with Hobbes, the unlimited and irrespon-

sible power of the *Leviathan*. "If the State be the source of property," says M. Saisset, the latest and best editor of Spinoza;—"if the State be the source of property, as it is the source of justice; if it makes the *meum* and the *tuum* as it makes the just and the unjust, the good and the evil, where is the limit to its omnipotence, where is the guarantee to the individual? Must we proclaim the State to be infallible, impeccable, and put into its hand, as Hobbes has done, not only the fortune and the life of the citizens, but their conscience, their thoughts, their soul in short? Spinoza made the greatest efforts to shake himself free from these consequences."<sup>1</sup> Nor did Spinoza's ingenuity desert him at this pinch. He carried the discussion a step backwards, and disposed of the justice by denying the possibility of despotism. "Those," he says, "who believe it to be *possible* for a single man to possess supreme right in the State are in a strange error. For right is proportioned to power. But the power of a single man is, and must be, insufficient for such a weight." Here apparently Spinoza forgot the source from which the powers of the *Leviathan* are derived by Hobbes—viz., the consent of the governed. Neither according to his system nor that of Hobbes had these powers any foundation in nature, for by nature no man was stronger or better than another. The consent was, *ex hypothesi*, a subversion of nature; and if that consent was absolute, there was no longer any difficulty about the absolute character either of the powers or the rights of the *Leviathan*. Apart from that consent there

<sup>1</sup> Vol. i. p. 209.

could, as I have said, be no government either *de fait* or *de droit*, because both Hobbes and Spinoza had assumed that all men were equally able and equally entitled to govern themselves. All government, so to speak, was thus a wrong which men inflicted on themselves, and Hobbes had contended for monarchy only on the ground that it was the form in which government was least wrong—the form, viz., in which it was possible to vindicate order at the smallest sacrifice of equality. Spinoza, as I have said, declined to accept this conclusion—with which, under the titles of Democratic-Imperialism, Caesarism, and the like, we have recently been so familiar—“and his manner of solving the problem,” as M. Saisset has remarked, “did more honour to his practical wisdom than to his philosophical sagacity.” According to him, there are no durable governments but such as are reasonable, and there are no reasonable governments but such as are temperate. “We are surprised and charmed,” adds M. Saisset, “to see this theorizer, who, by the rigid character of his mind, and the narrow logic of his system, seemed devoted to the idea of a simple democratic-despotism brought back by his natural sagacity, and his honest observation of facts, to comprehend and advocate a system of mixed government.”<sup>1</sup> But a moment ago we had difficulty in distinguishing him from Hobbes, and now we seem to have to do with Montesquieu.”<sup>2</sup>

<sup>1</sup> I rather think, with Mr Hallam, that no personal preference for any form of government can be inferred from the writings of Spinoza ; though, like all theories of equality, the logical issue of his, unquestionably, is despotism.—Hallam, vol. iii. p. 437.

<sup>2</sup> Saisset, vol. i. p. 213.

(c) *Rousseau.*

Though sects of "levellers," in the sense of mere rebels against authority, and religious fanatics like the old Anabaptists of Münster, were rather conspicuous in the days of Hobbes and Spinoza, both in Germany and England, neither Hobbes nor Spinoza lived to see the doctrine of equality brought to the test of experience by being actually adopted as the fundamental principle of government. Nor does any writer of decided mark appear to have undertaken the theoretical vindication of the principle of equality from the period when these philosophers quitted the stage<sup>1</sup> till the appearance of Rousseau's<sup>2</sup> celebrated *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1755), and his still more celebrated *Contrat social* (1762).

Montesquieu, it is true, treats of the subject of equality from various points of view, and often speaks of it in a strain that may well have paved the way for the sentiments which gained ascendancy in the next generation.<sup>3</sup> But how far he himself was from sharing those sentiments may be gathered from the distinction which he draws between the equality which he commended and the equality which

<sup>1</sup> I regard them as contemporaries. Hobbes was forty-five when Spinoza was born in 1633, but he outlived him by a couple of years, dying only in 1679, at the great age of ninety-one. All his works, moreover, were written in advanced life.

<sup>2</sup> Rousseau may be regarded either from a social or a political point of view, but the weapon which he employed for his double purpose was the same, and we have to do with it here in itself rather than in its applications.

<sup>3</sup> *E.g.*, "Dans l'état de nature, les hommes naissent bien dans l'égalité; mais ils n'y sauraient rester. La société la leur fait perdre, and ils ne redeviennent égaux que par les loix."—*Libre viii. chap. iii.*



he condemned. "Autant que le ciel est éloigné de la terre, autant le véritable esprit d'égalité l'est-il de l'esprit d'égalité extrême;" and he explains that true equality consists, not in everybody commanding and nobody obeying, but in those who are equally citizens of the State commanding and obeying each other. "Telle est la différence entre la démocratie réglée and celle qui ne l'est pas; que, dans la première, on n'est égal que comme citoyen; et que, dans l'autre, on est encore égal comme magistrat, comme sénateur, comme juge, comme père, comme mari, comme maître."

"La place naturelle de la vertu est auprès de la liberté; mais elle ne se trouve pas plus auprès de la liberté extrême, qu'auprès de la servitude." <sup>1</sup>

There is here, indeed, no express enunciation of the necessary relation between rights and powers; but it is plainly on that relation that Montesquieu believed that liberty must be based, and it was the restoration of that relation, when disturbed, which he regarded as the function of positive law.

Rousseau's system, however, as regards the basis on which it rests, is the very reverse of those of Hobbes and Spinoza. Like them, it is true, he holds absolute equality to be the true foundation of society. But to him it is an object to be attained, not a fact to be recognized, and thus he builds his house, as it were, from the roof downwards. Rousseau never ventures to assert that men are really equal, even at birth.<sup>2</sup> He does not allege that they treated each other as equal, otherwise than in so far as their equality was real, even

<sup>1</sup> *Ibid.*

<sup>2</sup> *Discours*, pp. 99, 100.

in the so-called "state of nature." His whole allegation, in point of fact, is that "the difference between man and man is *less* in the state of nature than in that of society, and that *natural inequality* in the human race is augmented by artificial inequality,"<sup>1</sup>—in other words, that it increases as civilization advances. From this statement, which I believe to be quite correct, he deduces conclusions which it does not seem to warrant in the slightest degree. Had Hobbes been right in asserting that God had made men equal, he would have been right in asserting that they were entitled to vindicate their equality. The fact, had it been a fact, would have supported the right; and Hobbes did not allege that the right ought to go beyond the fact; on the contrary, it was one of his favourite maxims, and one in which Spinoza followed him, that notwithstanding the mysteries connected with the presence of powers of wrong as well as of powers of right, rights, in the main, are measured by powers. But Rousseau laid no such substratum of fact. God had not made men equal, and the result of the exercise of the powers which He had bestowed on them was, that they had become unequal more and more. But Rousseau, like Mr Mill, gave it as his unhesitating opinion that God was wrong; that they ought to have been equal to begin with; or, at any rate, that they ought to be made equal now as fast as possible. Man must be *decivilized*. Though nature was not quite perfect, Rousseau, unlike Mill, thought her workmanship superior to that of mankind, his own, of course, excepted. Neither had he so bad an opinion of her as Hobbes. He did not

<sup>1</sup> *Discours*, p. 100.

believe in a natural state of war; on the contrary, the pictures which he drew of what he supposed to have been man's original condition in the woods, taken together with one of the most charming styles that ever was written, were the main causes of the marvellous popularity of his works. It is civilization and reason—which he strangely considers to have nothing to do with nature—that are the *bêtes noires* of Rousseau. “*L’homme qui médite est un animal dépravé. C’est la philosophie qui l’isole; c’est par elle qu’il dit en secret, à l’aspect d’un homme souffrant: péris, si tu veux; je suis en sûreté;*” and he proceeds to give a charming picture of a philosopher lying snugly in bed, whilst his neighbour’s throat is being cut under his window. “He has only to put his fingers into his ears,” he says, “and reason with himself a little, in order to prevent the sentiments of his nature from identifying him with the man who is being assassinated.”

It was his declaration against nature as it is, in favour of nature as he conceived that it ought to be (for he says expressly in his preface that he doubts if it ever were so), which gave its peculiarly dangerous character to the philosophy of Rousseau and his followers. If his premises were not sufficient to support rights of equality, they were fully sufficient to support rights of revolution, both social and political. When right was once divorced from fact, it was at everybody’s taking; there was no longer any external measure to it; there was no Leviathan to enforce it, if it had been measured; and so “ought” meant what every man thought it ought to mean. As nothing could be proved, nothing could be denied—one

man's assertion was as good as another's,—more especially as all men were equal, or ought to be so. Accordingly, in Rousseau's own case, one of the very first conclusions he arrived at was, that of all the discoveries of human reason, of all the devices of civilization, the most fatal was the institution of property.<sup>1</sup>

(f) *Democrats of the Revolution.*

When this stage was reached the theoretical deluge was come; and the French, unlike us, being a logical people, the practical deluge proved to be at no great distance. We need not pursue the subject further in this direction, nor waste our time over the shallow platitudes of that school of atheists, blasphemers, and libertines,—Diderot and his encyclopædists, Helvetius, the Abbé Raynal, Volney, and others, with whom unfortunately the really distinguished name of D'Alembert must be associated,—who inherited the errors and the vices without the genius of Rousseau. Assuming, with scarcely even the affectation of proof, the doctrines which they advocate with so much vehemence, the works of these men are totally destitute of scientific value, and must long ago have sunk into the oblivion which they deserve, had it not been for the practical recognition which, contrary to the intention of such men as Washington and Hamilton, this central principle of disorder obtained in America in 1776,<sup>2</sup> and its still more reckless assertion in France in 1789.

<sup>1</sup> Proudhon, however, is, I believe, entitled to the credit of the famous maxim that "property is robbery" (*la propriété c'est le vol*).

<sup>2</sup> The unguarded and unqualified assertion "that all men are created equal," with which the celebrated "Declaration of Independence" sets out, was due to Jefferson, to whom, though Adams was associated with him in the work, it is now

No attempt to strengthen its theoretical groundwork has been made by the many democrats and demagogues who have since reiterated it in America and on the continent of Europe ;<sup>1</sup> and, strangely enough, the only fresh argument in its favour with which I am acquainted that merits notice, even for its ingenuity, proceeds from one who is neither an American nor a Frenchman, neither a democrat nor a demagogue.

(g) *Ahrens.*

Ahrens, in strange inconsistency with his chapter on representation,<sup>2</sup> and his assertion that “l'égalité ne doit être conçue que comme la liberté également garantie à tous,”<sup>3</sup> has an elaborate vindication of equality, not merely as a consequence, but as the very basis of liberty—as the *sine quâ non* of personal freedom. It is not a defence of equality before the law in municipal affairs, nor of political or social equality

believed that the merit or demerit of the preparation of this famous document mainly belongs. Jefferson, as a born democrat (I use the word in its European and not in its American sense), was probably sincere in the statement ; but there is no reason to believe that Washington, or Jay, or Hamilton was led astray by it, and it is grievously to be deplored that they consented to its publication. If Adams at first inadvertently assented to the adoption of such a principle as the basis of the constitution of his country, there can be no doubt that he was thoroughly awakened from his delusion by the scenes which, shortly after, were enacted with a view to its vindication in France.—*Works of John Adams, Second President of the United States*, by his grandson, Charles Francis Adams, vol. i. p. 462. Some additional information on this subject will be found in a note to Mr Balch's work, *Les Français en Amérique*, pp. 37, 38.

<sup>1</sup> Even M. Emile Aollas, whom I regard as one of the ablest writers of the extreme political school, and who, if it were possible to separate his method from the use which he makes of it, would be entitled to rank high as a scientific jurist, does little more in this matter than accept the teaching of Rousseau.—*L'Idée du Droit*, 1871, p. 40.

<sup>2</sup> *Cours de Droit Naturel*, 5th ed., p. 511.

<sup>3</sup> 5th ed., p. 43. In the 6th ed., p. 43, it runs, “l'égalité n'est que la liberté garantie d'une manière identique à tous.” I do not see that the sense is altered.



in the sense in which that doctrine repudiates the existence of castes in the East, or of exclusive classes, such as was the noble class in France previous to the Revolution. As a protest against the impassability of any line either of social or political demarcation, we have always to a certain extent adopted the principle of equality in this country, where from the earliest times any man who began life at the bottom was permitted to end it at the top of the constitutional ladder, with the single exception of its last step into the Royal Family (and this even, with her characteristic liberality, her Majesty has recently rendered accessible), provided he had ability and energy, and bodily strength to climb so long and so high. But the sense in which the principle is advocated by M. Ahrens appears to be that of absolute social and political equality *de jure*, and in as far as is humanly possible *de facto*, of free citizens of the State. And the peculiarity of his position is, that he attempts to rest this claim on assumptions in point of fact, though of a less substantial kind than those which Hobbes thought necessary.

"The first quality," he says,<sup>1</sup> "which belongs to personal humanity, whether we consider it in itself or in its relations to other similar personalities, is *equality*."

Equality, he goes on to say, has a triple source—*physical, psychological, metaphysical*.

1. In its physical relations equality is the result of the unity of the human race. There is but one human nature, and consequently there is the same nature in all men. The different races are not different species of men as there are different species in the animal kingdom. The animal kingdom

<sup>1</sup> *Cours de Droit Naturel*, p. 229 et seq., 5th ed.

is divided into genera and species, which form so many steps on the ladder of ascending organization. In the animal kingdom nature begins her organization with the most imperfect beings, and runs through many stages before arriving at the superior animals—those, that is to say, which exhibit the functions of vitality in a more perfect form. Here it is not equality, but difference of organization that we remark ; there is a progression from the less perfect to the more perfect, and all the steps of the series are constituted by beings in whom are developed differently, but in a *predominant* manner, a particular organic system, at the expense of the other portions of the organism. The whole animal kingdom is thus created on the type of a progressive variety, or of an evolution, successive and always preponderating, of one or other systems of organization. The human race, on the contrary, is formed on a type of harmonious unity of all the systems and of all the functions of organic existence. The human organization, the most perfect of all, is the synthesis, the *résumé* of the whole creation ; it possesses *in æquilibrio* all the parts, all the organs, disseminated through the different classes of the animal kingdom. In consequence of this type of unity and harmony, so visible in the whole human form, man is functionally distinct from the animal. The human race is not a continuation or transformation from the animal kingdom ; it is organized on a superior principle and constitutes a kingdom apart—the human kingdom. This unity of the human race is the physiological reason of equality.

2. In a psychological point of view the same fundamental equality of all men is observable ; and it is worthy of remark

that the principle of harmony, which is the constituent element in the physical organization, dominates equally all the faculties and all the manifestations of mind. Man—the superior unity of creation—can raise himself by his intelligence to the ideas of the unity, the order, the harmony of the world; he can love them, take them as the models for his actions, realize them in his life. “*Ce caractère de l’homme se résume dans la raison.*”

To the same effect under the third head.

3. From the metaphysical point of view, “equality is founded on the grand principle that man is humanity”—that is to say, that human nature, *as a whole*, exists in each man.

Now the first thing that strikes one, on perusing this argument, is that it confounds the characteristics of genus and species. Supposing all that M. Ahrens has said to be true, physiologically, psychologically, and metaphysically, it is as true, *mutatis mutandis*, of each species of the lower animals as it is of the so-called genus man. The whole nature of the whole animal kingdom, it is true, does not exist in any other species as it exists in the higher species, just as all the steps of the ladder will be under the feet only of him who is at the top of the ladder. But the whole nature of the animal horse exists in each horse, the whole nature of the animal dog in each dog. Whether it be possible so to arrange the animal kingdom as that each species, as we ascend, shall contain the qualities of all the lower ones, and hold to them the relation which man is said by M. Ahrens to hold to the whole, or whether there be co-ordinate species which, in virtue of their

specific qualities, naturally exclude each other, are questions of comparative physiology with which we need not occupy ourselves here. Even granting to Ahrens the two positions for which he contends—first, that man is a distinct genus; and, second, that the genus man is not, like the genus animal, distinguishable into species—all that he is entitled to conclude is, that the different races of men do not constitute an ascending scale, but that each possesses the qualities common to the whole genus. But the same conclusion would follow from the ordinary hypothesis that man is not a genus by himself, but a species of the genus animal; for the same thing is true of every species *within itself*, whether we suppose them to be subordinated or co-ordinated to each other. The withdrawal of man from the genus animal, therefore, whether warranted or not in point of fact, seems to do nothing for the argument.

But fundamental unity, whether of genus or of species, does not exclude family, still less individual differences. Though all horses are equally horses, all horses are not equal horses. A turnspit is as much a dog as a mastiff, but he is not as much of a dog. The difference between them, moreover, is not the result of education, diet, climate, or any other external or accidental cause. It is a natural difference, as much as the difference between a dog and a cat. It is a difference which nature—*i.e.*, God—has imposed for reasons which, whether we apprehend them or not, are no doubt good and sufficient reasons; and, what is even more to the purpose, it is a difference which God will maintain, on the whole, and the partial obliteration of which, to the extent to which He permits it,

He appears to punish by the degradation of the more perfect family type. Now it is to the family distinctions within the same species that the distinction of races in the human species, or genus—whichever we choose to call it—is supposed by physiologists to correspond. Whether they exist to the same extent, and are equally the result of nature, or whether they are more attributable to circumstances within human control, are points on which it is not necessary that I should offer an opinion. That they exist at present to as great an extent as in any other species of animal, and that the history of mankind has not hitherto afforded the slightest indication of their ultimate obliteration, are the only points in the controversy which, as yet, can be regarded as settled. But even giving up the distinction of races altogether, which is more than M. Ahrens contends for (for even he goes the length of saying expressly that “the white race possesses faculties more *highly cultivated than the black*,”<sup>1</sup> whilst he makes no attempt to account for this cultivation on any other ground than that of higher natural gifts), all that is important for the support of the *opposite* conclusion to that at which he has arrived remains. It is not on distinctions of race, whether delible or indelible, that social and political inequality rests in European society generally, and least of all within the same state. Amongst persons of pure Caucasian blood no such distinctions are admitted, or even contended for. Even family distinctions, in the narrower sense of the family, are not placed on this basis. If you were to take ten men from the benches of the House of Lords, and ten men from the hulks, it would be a

<sup>1</sup> P. 230.



mere accident if you found the slightest difference between them in point of race; and it would be the same if you took men promoted to the highest station on personal grounds—the bench of bishops or of judges we shall say—and contrasted them with an equal number of crossing-sweepers. The whole fabric of inequality, of social and official pre-eminence and subordination, hereditary and acquired—which is in reality the whole fabric of society, in so far as society is an organic body and not a mere inorganic and chaotic mob—rests on *individual differences and their consequences*. Under their consequences, we include, of course, the transmission to others of the results of individual power or weakness, energy or indolence, virtue or vice, whether in the form of wealth and poverty, knowledge and ignorance, or sound and unsound moral training, and the like. Now Ahrens admits the existence of individual inequalities (Hobbes and Spinoza being, I fancy, the only speculators who were bold enough to deny them); but, what I confess seems to me scarcely less strange than if he had denied them, he does not admit that they are natural<sup>1</sup>—the result of God's arrangements—but ascribes them to human arrangements, interfering with God and nature, which it is the mission of Christianity to rectify. His position is consequently the same as that of Rousseau, with the difference that, for the present at least, he seems to hesitate in pronouncing social inequalities to be evils.

<sup>1</sup> Röder denies this (*Neuere Rechtsphilosophie in England, Tübinger Zeitschrift*, 1873, p. 226), but I can attach no other meaning to Ahrens's words. "Les inégalités," he says, "naissent, d'un côté, de la culture que les facultés reçoivent chez les divers individus, et, d'un autre côté, de l'application différente qu'on leur donne dans la vie sociale" (tom. ii. p. 37, ed. 1868); and much to the same effect.

We must remark, he says, that the equality which exists is equality only as regards fundamental dispositions and faculties, and that on that basis spring up inequalities deriving their origin on the one side from the culture which the faculties receive in different individuals, and on the other side from the different applications which are made of them in social life—"Tous les hommes sont égaux en tant qu'hommes, mais ils sont inégaux, en tant qu'individus,"—an indisputable proposition certainly! But he proceeds thus: "Inequalities are therefore inevitable; for, on the one hand, the development of each depends on his proper activity" (which one would imagine depended in some degree on his natural gifts); "on the other hand, the objects of human life are so vast that a single man can only embrace one of them as his special vocation if he would attain to anything like perfection. Inequality is thus an effect of individual spontaneity and liberty. Human nature is so rich that all the generations and all the nations are insufficient to exhaust its development. These inequalities are, moreover, useful; for equality of culture and application would cause the whole human race to die of *ennui* and *idiotisme*." Strange that the special function of Christianity should be to bring about so sad a result. One would imagine from these last phrases that a basis broad enough to support organic society was being laid after all, however false might be M. Ahrens's reading of nature.<sup>1</sup> But

<sup>1</sup> Ahrens grasps at everything that has the slightest resemblance to an argument in favour of this doctrine, with the desperation of a man supporting a monomania. "In the organization of the human body all the parts stand to each other in a conditional relation, and all are equally important; in like manner in a good social organism," &c.—(6th ed., vol. ii. p. 40.) One would think that it

the very next sentence undeceives us: "All the objects which mankind can pursue are *equally important* and necessary; because they are all human objects, and hence the *social equality* of all men—that is to say, the equal dignity of the different occupations or professions of men living in society."<sup>1</sup> One can scarcely believe one's eyes when one reads such words as these, knowing by whom they were written and how little they are in accordance with the general strain of his teaching. But after thus letting in the waters of anarchy it was needless to deplore their ravages, as M. Ahrens does in his section on Democracy in the 6th edition.<sup>2</sup> To pursue the discussion through the many pages in which these views are expanded and illustrated, and to trace the manner in which the argument is continually shifted from the assumption of individual equality to the assumption of equality of race—what is denied in one sentence being conceded in the next—would be an unwarrantable encroachment on the reader's time and patience. Enough has been said to indicate the character of a doctrine which, if logically carried out, would, by the tacit acknowledgment even of its author, tend to justify those schemes of socialism and communism which have since borne such fearful fruits, and which he ventures to condemn only as "exaggerations;"<sup>3</sup> and to warrant me in taking some pains to prove that the opposite doctrine, on which the whole of our social and political structure practically reposes, rests upon a sound theoretical basis.

might have occurred to him that a man's head could scarcely be dispensed with, but that he might get on very fairly without a finger or a toe.

<sup>1</sup> P. 231.

<sup>2</sup> P. 392.

<sup>3</sup> P. 245.

## CHAPTER IV.

## OF THE RELATION OF EQUALITY TO LIBERTY CONTINUED.

*In what sense is equality involved in the idea of liberty?*

*The idea of liberty involves the idea of equality in one sense only—that which is popularly called “equality before the law.”*

Before stating what is certainly the far older, and what I believe to be the far sounder opinion on the subject of equality, it may be well to recall the position in which the doctrines which we ourselves have evolved place us with reference to the theories which we have reviewed.

The view of human nature in point of fact—the diagnosis, so to speak—on which we have founded our belief in the rectitude of the existing organization of society in the main, and of the distribution of the gifts of Providence which actually takes place amongst mankind, is the very reverse of that on which Hobbes rested his political system. We have readily admitted the adequacy of Hobbes's premises to support his conclusions. If it were true, as he alleges, that “all men among themselves are by nature equal; the inequality we now discern hath its spring from the civil law,”<sup>1</sup> and that it is “a law of nature that every man acknowledge the other for his equal,”<sup>2</sup> I should be far from disputing Hobbes's second proposition that it is “another law of nature” that men allow *æqualia æqualibus*, or from denying the legitimacy of his infer-

<sup>1</sup> *Lev.*, vol. ii. p. 7, Molesworth's ed.

<sup>2</sup> *De Corpore Pol.*, vol. iv. p. 103.

ence that the recognition of social and political equality of the most absolute kind would have been inseparable from the vindication of justice. But Hobbes's system, and Spinoza's, in so far as he followed Hobbes, were the only ones in favour of which I felt compelled to acknowledge the merit even of logical consistency. In shrinking from the bold assumption with which Hobbes started, his followers rendered their own foundations insecure; and their arguments became more or less sound just in proportion to the extent to which they reverted to that assumption. Between all these systems then, and that which I have maintained, the question at issue, like so many so-called questions of principle, really resolves itself, in the last instance, into a question of fact; for, if we admit the adequacy of Hobbes's premises to support his conclusions, I think we may assume that Hobbes himself would not have disputed the sufficiency of premises the very opposite to support conclusions the very reverse. His recognition of the *æqualia æqualibus* would, in that case, have carried him back to the *Διὸς κρίσις* of Plato and to the Aristotelian doctrine, which, as we shall presently see, was known to the scholastic jurists as the *proportio*. For the determination of this fact, as of all other facts of our nature, I must refer the reader to the tribunal of subjective and objective experience. If, like Hobbes, he shall receive from consciousness, external observation, and history, as the three great exponents of nature, a verdict to the effect that all men are born and continue to be equal in fact, then, accepting the premises, he will also accept the conclusion of Hobbes's system, and recognize the social and political equality of all men as an object which



the science of jurisprudence is bound to seek ; and this although it should appear to him, as it appeared to Hobbes, that in order to attain it, even approximately, we must be contented to sacrifice liberty altogether, and resort to the desperate expedients of absolute despotism and complete centralization. But if, on the other hand, the verdict which he receives should coincide with that which has been vouchsafed to me ; if he should see it, or feel it, to be beyond all rational question that, for reasons which may possibly be hidden from us for ever, but which we are not the less bound to believe are in accordance with the scheme of absolute justice, God *has* distributed His gifts to His creatures very unequally, then this distribution being, as I have said, that which it is the object of the science of jurisprudence to carry into its minutest consequences, liberty will be saved—the fullest and freest exercise of his faculties, such as they are, will have been secured to every man—but the attainment of equality, in the absolute sense, will be finally and for ever excluded from the objects of jurisprudence. On the latter hypothesis, a legislative enactment which should have equality *in this sense* for its object would not possess the characteristics which I have pointed out as inseparable even from positive law,—it would be simply a legislative miscarriage.

But what then do we mean by “equality before the law” ?—for that is an object which jurisprudence surely does not repudiate, which is inseparable from liberty, and which, apparently, involves the recognition of the most perfect equality.

The distinction between “equality before the law,” and equality in the sense of the recognition of a right existing in

individuals to equal shares of God's gifts, or their consequences, admits of a very simple explanation. The method pursued by the science of jurisprudence in order to discover the truths which it seeks, like that pursued by every other science, necessarily embraces two functions — the one analytical, the other synthetical.<sup>1</sup>

(a) *Analytic justice.*

Equality before the law is neither more nor less than analytic justice. As such, it demands that legislative or judicial investigations shall be conducted with the same impartiality towards the subjects with which they deal, and towards the results which they may yield, as all other investigations that have truth for their object. When the legislator who is about to enact, or the judge who is about to apply a positive law, proceeds to inquire into the facts of the case with which he has to deal, the value of the claimants, or the suitors, as individuals, are considerations just as irrelevant to him as would be the market price of lead or silver to the chemist who was about to inquire into the presence or the absence of lead or silver, or the proportions in which they existed, in a piece of ore. The individuals, or classes, or nations, whose rights and relations are under investigation, are entitled at the hands of the jurist, of the arbiter, or, if no litigation has arisen, of each other, to the same "equality" which the chemist accords to the substances which he puts into his retorts and his crucibles. If this equality be denied in either

<sup>1</sup> "Both are absolutely necessary to philosophy, and both are, in philosophy, as much parts of the same method as, in the animal body, inspiration and expiration are of the same vital functions."—Sir W. Hamilton's *Lectures on Metaphysics*, vol. i. p. 99.

case, the result of the inquiry will be vitiated,—the parties will be wronged. The chemist will produce a false report; the legislator will enact a law which does not fulfil the conditions of true positive law; the judge or the arbiter will pronounce a false judgment or an unfair award. Viewed in its analytical function, then, as an inquiry into what lawyers call the “merits,” justice—and liberty, as the object of justice—do unquestionably demand absolute equality; and this it is, and this only, that is meant by “equality before the law.” That all men are equal, to this extent, is the first maxim of the science of jurisprudence. Jew and Gentile, white skin and black skin, the wise man and the fool, the slave and his master, the prosecutor and the criminal, all stand on the same level.

Nor does this species of equality stop even with the human race. When the Society for the Suppression of Cruelty to Animals brings a question between a horse and a man before the judge, it is his duty to place the horse and the man on a footing of absolute equality;<sup>1</sup> and we have seen that something analogous takes place when a question arises between the exercise of mere human caprice and the interests even of a plant or a tree. “The last rose of summer” is entitled to “equality before the law.”

(b) *Synthetic justice.*

But the absolute equality which governs the inquiry does

<sup>1</sup> On this ground, as well as on the ground of its greater scientific value, if we must have vivisection, its proper subjects seem to be human criminals. In their case, of course, as in the case of the lower animals, all needless suffering ought to be avoided, and the apportionment of needful suffering amongst individual criminals ought to be relative to the atrocity of their crimes.

not necessarily belong to the result, for in that case the result would be already determined. If we recur to the physical illustration of which we have just made use, it will be at once apparent that the claim for equality, in the sense of equal shares of whatever may be the object in controversy—wages or labour, power, or honour, or responsibility, or punishment—is a begging of the question which it belongs to analytic justice to determine, or a repudiation of the result at which analytic justice has arrived. For what should we think of telling a chemist, beforehand, what the result of his analysis must be—that it must result in the discovery of equal quantities, or equal values, of silver and of lead—and that we will accept it and make use of it on no other condition? Would he not tell us, in return, that the result was independent both of him and of us, but that, if we would wait for it patiently, he would declare it loyally; that if nature herself had established the equality on which our heart was set, he would not fail to proclaim it; but that, on the contrary, if, for reasons with which he had nothing to do, nature had arranged it otherwise, in that case equally he would tell us the truth. Now, precisely in the same manner, it is neither equality nor inequality, but fact, which the analytic jurist being bound to discover and proclaim, the synthetic jurist is bound to accept, and to vindicate deductively. Whether the relation, in point of fact, be that of equality, of superiority, or of inferiority, the just award, the true result of the joint action of the two inseparable elements of all scientific method, will be proportioned to that relation. In other words, the duty of the practical jurist, whether legis-

lator or judge, will be to see, not that all men are equal, but that those who are equal shall have equal shares, and that those who are unequal shall have unequal shares *proportioned to their inequality*.<sup>1</sup> His function will be to assign to the *inæquales* the *inæqualia* which the previous investigation, the analysis, has shown to be theirs.

As regards the relation between equality and liberty, then, the conclusion at which we arrive is this: The principle of analytic justice is equality—the principle of synthetic justice is proportion, the terms of which are determined by the previous analysis. When these two principles are vindicated, the sphere of jurisprudence is exhausted, and liberty, as its object, is realized.

There can be no doubt that the political teaching of Socrates embraced the distinction between what I have here called analytic and synthetic justice. Plato states it quite clearly, as will be seen from the subjoined passage from the *Laws*, which I am now able to give in Dr Jowett's classical translation;<sup>2</sup> and Aristotle worked it out, in greater detail, first in the *Ethics* and then in the *Politics*.

<sup>1</sup> τῶ μὲν γὰρ μείζονι πλείω, τῶ δ' ἐλάττωι μικρότερα νέμει, κ.τ.λ.—Plato, *Laws*, lvi. c. v. μὴ ἴσοι οὐκ ἴσα ἔξουσιν, *et vice versâ*.—Aristot. *Eth. Nic.*, v. c. iii. *et seq.*

<sup>2</sup> The old saying that "equality makes friendship," is witty and also true; but there is obscurity and confusion as to what sort of equality is meant. For there are two equalities which are called by the same name, but are in reality in many ways almost the opposite of one another; one of them may be introduced without difficulty, by any state or any legislator in the distribution of honours: this is the rule of measure, weight, and number, which regulates and apportions them. But there is another equality, of a better and higher kind, which is not at once recognized. This is the judgment of Zeus, which has little place in human things; that little, however, is the source of the greatest good to individuals and states. For it gives to the greater more, and to the inferior less,



But the learning and ingenuity of two thousand years, culminating in that of modern Germany, appears to have failed to evolve a consistent and exhaustive theory of justice from Aristotle's discussions, in the form in which they have come down to us.<sup>1</sup> And yet all men recur to them for instruction, and recur to them not in vain, because they proclaim the great principle that all applied justice is necessarily proportional justice, and that the equality which it measures out is not absolute equality, but equality which shall bear an absolutely accurate relation to the facts of nature, and to their consequences. In Rome, during the earlier and better portion of her history, the distinction secured practical if not theoretical recognition; and the best minds of the middle ages preserved a perfectly clear conception of the "*proportio*."

always and in proportion to the nature of each; and, above all, greater honour to the greater virtue, and to the less less; and to either in proportion to their respective measure of virtue and education. And this is justice, and is ever the true principle of politics, at which we ought to aim, and according to this rule order the new city which we are founding, and any other city which may be hereafter founded.

<sup>1</sup> I used to think that this would be possible by identifying diorthotic justice (δικαίων διορθωτικόν) with what I have here called analytic, and dianemetic justice (δικαίων διανεμητικόν) with synthetic justice, and that order might thus be brought out of the confusion into which the 5th Book of the *Nicom. Ethics* confessedly has fallen. On a re-examination of the text, with the light which Professor Trendelenburg's learned dissertations (*Zur Aristotelischen Ethik. Historische Beiträge zur Philosophie*, vol. iii. p. 399, Berlin 1867) throw on it, I am convinced that no such identification is warranted. Aristotle unquestionably intended both as subdivisions of applied, or synthetic justice; and in this sense, as I have explained above, I cannot subscribe to the absolute distinction by which the one is confined to public, and the other to private law, which Professor Trendelenburg appears to accept. I think they involve each other, and that both must come into play in every department of jurisprudence. For the scholastic distinction between commutative and distributive justice, see Thomas Aquinas, *Sum. Sec. Sec.*, quæ. lxi. art. 1.

"Jus," says Dante, "est realis et personalis hominis ad hominem proportio, quæ servata servat societatem, et corrupta corrumpit;"<sup>1</sup> and Thomas Aquinas, "Materia justitiæ est exterior operatio, secundum quod ipsa operatio vel res cujus est usus, debitam proportionem habet ad alteram personam; et ideo medium justitiæ consistit in quâdam proportionis æqualitate rei exterioris ad personam exteriorem."<sup>2</sup> And still more definitely, in speaking of distributive justice, he says, "Et ideo in justitiâ distributivâ non accipitur medium secundum æqualitatem rei ad rem, sed secundum proportionem rerum ad personas, ut scilicet una persona excedit aliam, ita res quæ datur uni personæ, excedat rem quæ datur alii." And he applies it thus, "Tantò plus alicui de bonis communibus datur, quantò illa persona majorem habet principalitatem in communitate."<sup>3</sup>

In like manner the principle of proportion appears to have been recognized by the great lights of our own jurisprudence. "Justice," says Lord Stair, in a little book which is generally ascribed to him, "implies proportion. . . . Though all the damned be eternally punished, yet not equally; because there is not equal strength to bear, and more atrocious guilt to punish,—it shall be *more* tolerable for Sodom and Gomorrah *than* for Capernaum."—*Divine Perfection*, pp. 181, 182. If there is to be proportion in intensity, why not in duration? One would fancy that here Lord Stair's reason could scarcely have failed to conflict rather rudely with his orthodoxy.

<sup>1</sup> *De Monarchiâ*, lib. ii. sect. 5.

<sup>2</sup> *Sec. Sec.*, quæ. lviii. art. 10. Röder's *Naturrecht*, vol. i. p. 115.

<sup>3</sup> *Sec. Sec.*, quæ. lxi. art. 2.

It would be interesting to inquire, more carefully than we have done, when the vulgar conception of equality, which since the French Revolution has made such insane havoc in European politics and economics, first assumed the aspect of a speculative doctrine. It is certainly older than Hobbes, and is, as I have said,<sup>1</sup> traceable as far back, at any rate, as the attempts of the Jesuits to found a theocracy by levelling down all secular distinctions before the Church. Whether or not we can recognize it in the demands of the leaders of Wat Tyler's insurrection in 1381, of which I shall speak by-and-by, might be questioned; and I doubt whether the theories even of the extremest republicans of the Commonwealth embraced it. But there is, as I have said, no trace of it in the chief of the schoolmen, though the times in which he lived—those of Simon de Montfort—were such as might naturally have raised such questions; and whencesoever it may have come, it most assuredly did not come from Aristotle, for he unmistakably extends the *proportio* (τὸ κατ' ἀξίαν ἴσον) not only to justice in every form in which it is known to jurisprudence, but to justice in forms in which jurisprudence can scarcely approach it.<sup>2</sup> “Even friendships,” he says, “which appear unequal, are equalized and saved by proportion (τὸ ἀνάλογον), just as tanners, shoemakers, and weavers exchange their commodities in proportion to their value.”<sup>3</sup>

This great principle of proportion, before which the spirits of misrule tremble as if it were holy water, being once secured, it is doubtful whether much is gained for science by

<sup>1</sup> *Ante*, p. 378.

<sup>2</sup> Trendelenburg, *ut sup.*, 408.

<sup>3</sup> *Nic. Eth.*, ix. 1.

dividing applied justice under different heads, as Aristotle did, or as Eudemus did for him. Such absolute distinctions as those which would confine dianemetic or distributive justice to public, and diorthotic or corrective justice to private affairs and the righting of wrongs, whether criminally or civilly, cannot be maintained.<sup>1</sup> If we take the familiar instance of the distribution of a bankrupt estate, we shall see distributive justice acting as unmistakably as when the State distributes its honours, rewards, and responsibilities, and with more mathematical precision. Suppose one man has invested £50, and another has invested £500, in the concern, and that the dividend is 1s. per £. The one man will get £2, 10s., whilst the other gets £25. The proportion is preserved, and the whole proceeding is dianemetic, though it takes place within the sphere of private law. Then, as regards the other, the diorthotic principle, which is said to be confined to private law, and to act by simple addition and subtraction. Is it not obvious that it may be called into action in public, just as the dianemetic principle may be called into action in private law, and that it may there act in the same manner? For suppose the State hitherto has wronged a particular class of persons, we shall say, by giving them less political power than corresponded to their real weight or value in the State, will not the remedy in this case be effected diorthotically (correctively) by giving to them, and in giving to them by taking away from other classes, such an amount of power as shall restore the true political balance (the *proportio*) between them? And is not this remedy just the dianemetic result, the distributive

<sup>1</sup> *Ante*, p. 409, note. Lord Stair gives it universal application, *ut sup.*, 184.

justice, which in this case is worked out in the form of corrective justice? These two principles, then, resolve themselves into each other, or, at most, they are two different forms of synthetic justice, the application of the one or of the other of which depends on the circumstances of the case, and not on the department of law—public or private, national or international—in which it is called into play. The same remarks apply to retributive justice (*τὸ ἀντιπεποιθός*, *retaliatio*, *jus talionis*), the action of which Aristotle is also careful to limit to the *κατ' ἀναλογίαν καὶ μὴ κατ' ἰσότητα*,<sup>1</sup> and I think to every other kind of justice—if other kinds there be—in whatever relations they may be called into play.

If the distinction between diorthotic and dianemetic justice, in the form in which it is usually stated, be Aristotle's at all, which may well be doubted, it is perhaps to be accounted for on the ground that, being a politician and not a lawyer, he felt the necessity of the limitation which the proportional element seemed to impose more forcibly in public than in private law. That, unlike the modern world, Aristotle was deeply impressed with the necessity of excluding absolute equality from the sphere of politics cannot be doubted. On this subject his dicta are consistent and unequivocal. But his position, even in this respect, would have been strengthened, and his object more effectually attained, had he, or his interpreter, perceived that equality is the principle of analytic justice exclusively, that there it is absolute, and does not come into action in synthetic justice at all, in any department, either public or private, otherwise than accidentally—

<sup>1</sup> Trendelenburg, *ut sup.*, p. 404.



*i.e.*, as a result of the antecedent analysis. From this source—from nature as interpreted by science—it is true that its appearance on the political horizon remains formally possible. If nature should repent her of what so many seem to regard as her previous wrongs, and for the future should send men into the world equally endowed; if further, by their own efforts, by mutual aid, or any other means, they should develop themselves equally, and keep abreast of each other—if all workmen, for example, should possess the same skill and industry, and produce the same quantity and quality of work, then the economist and the politician, like the judge, must take them as he finds them, and recognize their equality. Till these occurrences take place, absolute equality and liberty are irreconcilable conceptions,—aspirations which mutually exclude each other,—and the apparent reconciliation of which, even for a time, can be purchased only at the sacrifice of justice.

## CHAPTER V.

OF THE LIMITS WITHIN WHICH AGGRESSION IS A NATURAL RIGHT.

(a) *Aggression is a natural right, the extent of which is measured by the power which God has bestowed on the aggressor, or permitted him to develop. Up to this point, the right of conquest, individual, social, political, and ethnical, is involved in the idea of liberty, and included in the objects of jurisprudence.*

To those who have accepted our doctrine with reference to the sources of jurisprudence, and the consequent rectitude of the *de facto* principle, when seen at once from the subjective and objective side, the soundness of this proposition, startling as in its practical aspect it at first sight appears, in so far as logic is concerned, will be even more obvious than that for which we have just been contending. If God be the source of life, and life be the source of rights, life in every form warrants the amount of aggression that is requisite for its preservation and development, and the higher the life the greater the amount of aggression which it warrants.<sup>1</sup> Man is the aggressive animal, *par excellence*; and the most prolific, the most highly endowed and developed men, and races of men, are the most aggressive. The process is one which we contemplate with approval every day, in the individual, the family, the state, the race;—the able, the active, the industrious, the frugal, the instructed, the earnest, supplant the weak, the indolent, the idle, the ignorant, the frivolous. The rule is one to which there are no real and ultimate exceptions at all. But there are many hidden sources both of power and weakness, and there are many successes and failures which are only apparent; and it is by omitting to notice the former, and by dwelling on the latter—by watching the wave whilst we fail to observe the tide—that, to our eyes, it seems as if “the race were not to the swift, nor the battle to the strong.” The region in the history of human affairs which we assign to chance is merely a territory of mystery to which the understanding does not penetrate. It is neither lawless, nor governed

<sup>1</sup> *Ante*, p. 170.

by any other laws than those with which we are familiar. *Providentia, fatum, natura, casus, fortuna, sunt ejusdem Dei varia nomina.*<sup>1</sup> But there are directions in which the understanding is led astray by partial or intermittent light. In a calculation of chances otherwise accurate, the moral element in the combatants or their leaders, or the influences of the good and the bad cause, escape our observation, or count for less than their due, and we are startled by what seem to be results without causes. And yet there is nothing more exceptional in the case of a handful of conquerors overrunning a corrupted and degraded people than when nerve conquers muscle, or the invalid survives the illness of which the strong man dies. Again, the exertion of a single faculty, or a spasmodic effort of the system, often produces immediate success, just as the gratification of a single passion produces immediate pleasure. But the partial character of the success, and the ephemeral nature of the pleasure, taken along with the cost at which they are purchased, deprive them of all absolute reality. They are comparable only to the joys of intoxication, or the triumphs of the lunatic or the fever-patient over his keeper or his nurse.<sup>2</sup>

Moreover, the limits of the right of aggression are deter-

<sup>1</sup> Seneca, *De Beneficiis*, iv. 8; Culverwell, p. 38. See also Hume, Essay II. "Liberty and Necessity;" and Calderwood, p. 176.

<sup>2</sup> To this category the conquests of the first Napoleon, and the consequent intoxication of his countrymen, emphatically belonged. They were no more instances of real success than the hallucinations of insanity are proofs of fact. The same may be said of the conquest of Alsace by Louis XIV., and would no doubt have come true of that of Rhenish Prussia and Bavaria, had France proved successful in the late war. The inroads of the so-called barbarians on the effete Roman Empire, on the other hand, were true, and have been enduring conquests;

mined for us by the same principles by which its reality is guaranteed ; for we have seen that, from the necessary interdependence of rights and duties, there *can* be no aggression which is either rightful or real on the part of the aggressor, by which the object of the aggression is not an equal gainer. All aggression which is really and ultimately destructive either of life or liberty on the whole, is excluded from the objects of jurisprudence by the *de facto* principle, on the ground that it is self-contradictory and suicidal,—that it counteracts its professed action,—that it ceases, in short, to be what it calls itself. You thus perceive once more that if might be right, it is not less true that right is might : and for this simple reason that, in the last analysis, they are necessarily coincident. It is man's weakness and wickedness alone which puts asunder, for a time, what in God is ultimately united ; for "there is no power but of God."<sup>1</sup> When applied to international relations, these principles suggest the conditions of the exercise of the right of national and ethnical development and expansion. They reconcile us to the course of the world's history, as they do to that of our country, our county, our parish, our profession, our family, or to our own. That the Anglo-Saxon race should supplant the Red Indian in America, or the Celtic in Scotland, in Ireland, and in Wales, are occurrences which, if brought about by natural means, are as fully in accordance with natural law,—as much in the

whereas the conquests of the Turks were the result of temporary dissensions between the Christian races, in whose hands the real power always was, and are now being gradually reversed.

<sup>1</sup> Rom. xiii. 1.

interests of the supplanted,—as that B, who had made a fortune, should purchase an estate for a price which, otherwise invested, will yield more than its rental, from A, who has lost a fortune and is in want of a living; or that D should be appointed to an office for which C has become incapable, and his retention of which could only cover him with disgrace. Mr Froude has, with great truth as it seems to me, traced the woes of the Irish mainly to the fact of their refusing to accept a conquest the reality of which they were unable to disprove, and attempting by murder and fire-raising to supply the place of legitimate warfare.<sup>1</sup>

<sup>1</sup> *The English in Ireland in the Eighteenth Century*.—"The difficulties of Ireland are sometimes dismissed as an insoluble problem; but it is at the least worth while to acquaint ourselves thoroughly with the historical circumstances out of which those difficulties have grown. The examination of this history seems to lead irresistibly to the conclusion that the wretchedness of Ireland is the result of a fallacy which has taken fatal hold of a large section of the Irish people. That fallacy lies in the notion of an absolute right, inhering in each people, to local and independent self-government. In the author's belief, no such absolute right exists. The title to this privilege must be contingent on the power of a nation to defend itself, and the power of a nation to defend itself must depend generally on the ability of a nation to govern itself, and to present a steady and compact front to all assailants from without. In short, the right to resist depends on the power of open resistance; and there are certain courses to which a nation is not justified in resorting when that power fails them."

"This truth is brought out with singular clearness by a comparison of the history of Ireland with that of Wales and Scotland. The premature violence of Edward I. hardened Scotland irrecoverably into a separate nationality, and thus the union, when it came about at last, was effected on equal terms. The Welsh resisted with desperate bravery until resistance became obviously hopeless; and then, loyally and wisely accepting their fate, they were received on equal terms as joint inheritors of a magnificent empire. The people of Ireland might have resisted like Scotland, or, failing this, might, like the Welsh, have retained their language, their customs, and religion. They chose to adopt a third course. Leaving always an unguarded side open to attack from without, their contending factions never failed to supply men ready to do the enemy's work for the further-



But what are natural means? Does the natural right of conquest justify the use of force? and if so, when? and to what extent?

(b) *An end that is just, justifies the means requisite for its attainment; the right of aggression, consequently, justifies the application of force, and involves the right of war, when, and to the extent to which, force or war is necessary for its vindication.*

An art is more or less perfect in proportion not only to the completeness with which it accomplishes its object, but to the smallness of the means which it employs, the friction which it causes, or the force which it expends. The law of parsimony has practical as well as theoretical validity. If aggression then be, as we have seen, one of the objects of natural law, and if force be indispensable to the attainment of that object, the use of force to this extent is justified by natural law, and its application falls within the sphere of jurisprudence as an art; but the perfection of this art will be greater or less in proportion to the smallness of the amount of force with which it realizes just and necessary aggression. Neither in this nor in any other respect is there the slightest difference in the principles which govern public and private relations. In both, the legitimate amount of aggression is that which corresponds to the real power of the aggressor, and the legitimate amount of energy or force is that absolutely requisite for its realization. Here, as everywhere, the end

ance of their private advantage; and when the victory of the enemy was thus insured, the alternative of cheerful submission, rewarded by equal partnership, was rejected for discontent, and for a war of assassination systematized by secret tribunals." It is precisely on the same principle that, in private life, men are entitled to fight but not to quarrel.

justifies the means only to the extent to which the value of the end exceeds the value of the means.

If states were reasonable beings, living under a rational system of international law, the richer and more populous country would flow over gently into the other by voluntary arrangement, and this to their mutual benefit. The fact of conquest, like the fact of purchase, would, if necessary, be ascertained judicially, and its recognition would be enforced executively. Such a process *in minimis*, may sometimes be seen where both states are members of the same confederation, and where no international jealousies hinder this natural process of adjustment, as, for example, in the Swiss cantons, or in our own counties; and this fact, if it stood alone, would furnish a powerful argument in favour either of very small states or of universal empire, or of the two in conjunction. But whilst men continue to be men, the objections to such schemes are obvious, even if their realization were not impossible; and as the great independent nations, and separate races of mankind, have not yet become reasonable entities, or developed a rational system of international adjustment, it is plain that natural rights of aggression, when they arise in point of fact, will in general have to seek realization by means of force. Nor is it less obvious that if the question be between the non-realization of this right, and its realization by the application of force, even in the terrible form of war, the latter may often be the preferable alternative; for the former, even if it were possible, which it is not, would involve the abandonment of the end, whereas the latter secures its attainment, though at a terrible, and perhaps need-

less expenditure of means. Let us strive then for the abolition of war by the development of a self-vindicating system of international jurisprudence; but let us not waste our time and our energies in futile efforts for its direct abolition, before we have succeeded in supplying its place, and providing, by peaceable means, for the vindication of the natural right of aggression.

The most terrible responsibility that can fall to the lot of man is that of determining the point at which a *casus belli* has arisen; and this responsibility is heightened by the fact that there is scarcely any cause that is wholly just and pure. But as a counterpoise to scruples which may paralyze the arm of duty as well as restrain the hand of violence, it is well on such occasions to remember, that as there are central truths to which we must hold, notwithstanding the admixture of error which we detect in the forms in which they are presented to us, so there is a central right—a “right side”—in every question which, if we can but find it, we are entitled to embrace, and for which, if need be, we are bound to fight if we are able, notwithstanding the wrongful manner in which it may have been hitherto, or may still be, maintained. A cause, a party,<sup>1</sup> or a state which is mainly in the right, though partially wrong, merits not our sympathy alone, but our support, against one which is mainly wrong, though partially right. Virtue and knowledge may or may not be

<sup>1</sup> The tendency of all parties, however, to be driven into extremes by the spirit of opposition which animates them, is so great that implicit faith in them has always been regarded as an indication of mental imbecility. “The superior man,” said Confucius, “is catholic and no partizan. The mean man is a partizan and not catholic.”—Legge’s *Chinese Classics*, vol. i. p. 14.

identical ; but imperfection is a characteristic which clings, in this world, to the realization of both. There are, it is true, no imperfect obligations, and therefore we must make no compromise even with little sins. But nations, like individuals, obey as they know, only in part ; and from both the most scrupulous of us must be satisfied with that partial obedience which, as sinners ourselves, we hope may be accepted by Him who "hates sin with a perfect hatred."

## BOOK III.

OF THE SOURCES OF POSITIVE LAW, OR  
SPECIAL JURISPRUDENCE





## CHAPTER I.

### OF THE ULTIMATE SOURCES OF POSITIVE LAW.

THE ultimate sources of positive law are—

(a) *The Law of Nature.*

(b) *The conditions of existence under which that law must be realized.*

But the perfect realization of the law of nature, even in the relative sense of its perfect adaptation to the circumstances of imperfect beings, is impossible to such beings from four causes :—

1st, The imperfection of their knowledge of the law to be realized.

2d, The imperfection of their knowledge of the conditions of its realization.

3d, The imperfection of their power to realize it as known to them.

4th, The imperfection of their will to realize it as known and possible to them.

Though human autonomy, in the abstract, be demonstrable beyond dispute, human autonomy, in the concrete, thus suffers serious limitations ; and in our search for the limits within

which and the means by which it is practically attainable, we have to look, not to the ultimate, but to the proximate sources of positive law.

## CHAPTER II.

### OF THE PROXIMATE SOURCES OF POSITIVE LAW.

The proximate sources of positive law, or the sources of positive law as such, like the sources of natural law, may be divided into (a) Primary, and (b) Secondary.

(a) *The primary source of positive law is the real power of the whole community subject to the law, as exhibited in and measured by its rational will.*

(b) *The secondary sources of positive law are the means by which the community vindicates its real as distinguished from its merely apparent power, or, in other words, asserts its rational will.*

## CHAPTER III.

### OF THE PRIMARY SOURCE OF POSITIVE LAW.

The definition which I have given of the primary source of positive law involves the following propositions :—

(a) *That real positive law, as distinguished from mere enacted*

*law, will exist in a community, that the community will be practically autonomous, to the extent to which power and reason exist and coincide in it, or, in other words, to the extent to which its power is real and not merely phenomenal.*

In our previous discussions we have seen that the fact that power is the root of law, is guaranteed to us by the necessary coincidence, to our minds, of the two conceptions. Absolute power and absolute law differ only as different manifestations of the same divine influence. If "might makes right," it is equally true that "right makes might." As a whole, the universe must be a perfect Kosmos; at all events, we who are part of it, and have no higher or other measure of Kosmos—of Order—than its laws, cannot think of it otherwise. To us the relative and the absolute are necessarily coincident, so that in accepting God's will as our law, we do not sacrifice the absolute character of morality. But this world is a part of this perfect Kosmos, equally subject with every other part of it to the same power and the same law. It would thus appear that the coincidence of power and law, which we must predicate of the whole, we must equally predicate of the part—in other words, that "might and right" are ultimately coincident, even in this present world. But though we are impelled by our reason to accept this result as ultimately irrefragable by us, we are shut out from it, proximately, by experience, the reality of which is guaranteed both by internal and external evidence. The presence in the actual life of man—our own and that of others—of those mysterious and contradictory elements which exhibit themselves as imbecility, ignorance, and an evil will, not only limit in man the manifestations

both of power and of law, but render their coincidence necessarily partial. As there is law which does not generate power, so there is power which does not generate law—nay, which, for the time being, destroys it. By what test, then, shall we distinguish power which is, from power which is not, legislative? Now with this test we are already familiar. It is the test of that *ultimate* reality which arises from harmony with nature as a whole, as opposed to partial nature. If nature be true, all power which manifests itself as opposition to nature must be false, contradictory, and ultimately suicidal—not real and ultimate power, but only phenomenal and evanescent power. But reason is the recognition by man of truth, or, in this relation, of the harmonious teaching of nature. Reason is nature—ultimate nature—revealing herself in the consciousness of the individual and the race. Real power is thus the power which reason tells us is coincident with nature, not in part, but in whole; and as it is this power which alone can be ultimately legislative, I think the conclusion is warranted that the extent to which a given community is autonomous, or self-governing, will be measured by its real power. It is the vicious habit of breaking nature into two—a good nature and a bad nature—in place of regarding what is called “bad nature” as unnatural, false, the antagonistic element to nature as ultimately manifested even in time and space, that has led some to imagine that in invoking reason as a source of positive law, I am calling in some *Deus ex machinâ* to help out a speculative system which had proved inadequate for practical purposes. So far from regarding reason, “the spirit of truth,” as something antagonistic to, or even different from, nature, I



regard it, as those who have followed my previous reasoning with any degree of completeness cannot fail to know, as neither more nor less than the divine element of nature as a whole, making its voice heard above the distracting and self-contradicting outbursts of our separate impulses. Reason, in this sense, is nature not only revealing truth, but revealing power, telling us the condition of its ultimate efficiency, its reality. Reason is thus the necessary concomitant of power, the condition of effective legislation *sine quâ non*. But we are shut out from making reason or right, as distinguished from power or might, the source of legislation by two considerations: 1st, We should thereby invert the order in which the two phenomena—power and reason—present themselves, ontologically; for the primary postulate of existence is power, not reason. 2d, We should reduce legislation, and, consequently, jurisprudence, to the condition of a formal science, and deprive it of the means of enforcing its decrees. On the other hand, the distinction between real and apparent reason is frequently more obvious than that between real and apparent power, and reason thus becomes the safer starting-point. What we must, above all, bear in mind, however, is their inseparability. There never was a reasonable—wise—man or nation that was not ultimately powerful also; there never was an unreasonable—foolish—man or nation that did not come to material grief.

(b) *Positive law can originate and subsist in a community only to the extent to which that community is free, and all true legislation is thus, in the last analysis, self-legislation.*

Freedom and power, for our present purpose, may be re-

garded as convertible terms. The Creator, who is omnipotent, alone is absolutely free. The freedom of created beings, like their power, is limited; but this limitation does not prevent the one from corresponding accurately to the other. Nor is there any exception to this rule in the case of what we call latent power. The strong man in fetters is popularly regarded as one whose power is unimpaired, though his liberty be gone; but a moment's reflection suffices to convince us that his liberty is latent like his power, and precisely to the same extent. The correspondence of power to freedom then, and of freedom to power, may be stated as absolute; and of communities, as of individuals, we may say that they are free to the extent to which they are powerful, and powerful to the extent to which they are free. "A law is founded," says Culverwell, "in intellectuals, in the reason,—not in the sensitive principle. It supposes a noble and free-born creature, for where there is no liberty there is no law."<sup>1</sup> The coincidence between freedom and law results, moreover, not only from our acceptance of power as the source and measure of both, but of freedom as the object of law,<sup>2</sup> and the obvious consequence that they can be realized only in common.

In opposition to this train of reasoning, however, it may occur to the reader that a definition which, by identifying legislation with self-legislation, denies the character of positive law to all law imposed by external human authority, conflicts, or may conflict, with the *de facto* basis which we have assigned to jurisprudence. If power, you may say, be the source of all law, if the fact of the reality of power be the

<sup>1</sup> P. 62.

<sup>2</sup> *Ante*, p. 355 *et seq.*

warrant for its exercise,—why should not the power of a conqueror, or of a conquering race, be the source of legitimate positive law? The power of Russia over Poland, and of Germany over the recently conquered French provinces, as a phenomenon, is for the present unquestionable; and inasmuch as it is not impossible that it produces a higher degree of individual freedom of action than any which either Poland or France ever succeeded, or would have succeeded, in attaining by their unaided efforts, it is not inconceivable that it may be real permanent power—the result, not of any ephemeral spasmodic and self-counteracting effort, but of the normal exercise of the right of aggression by autonomous or anarchical races, which we have admitted within the sphere of natural law.<sup>1</sup> Is there, then, any ground on which the character of positive law can be withheld from the law of Russia as administered in Poland, or that of Germany as administered in Alsace? My answer is, that the law of the conqueror, as the only means of attaining or approximating to the attainment of the object of all law, may be good positive law *to* the conquered state for the time being, or even permanently; though, in its primary aspect, it is not the positive law *of* the conquered state. Take, as an example, our government of the anarchical native states of India. The source of the law which we administer to them—its positive source—is elsewhere—viz., in the overbalancing weight of the conquering power, occasioned by the higher reason which for the time being resides in that power, from its being more *real*. A conquered province or nation is, in the community of nations,

<sup>1</sup> *Ante*, p. 415 *et seq.*

in the position of the party that is out-voted, or of the individual who is not *sui juris* in the civil community. Both obey a law to which, directly at least, they have not consented; but which, inasmuch as by vindicating Kosmos it ministers to the attainment of liberty on the whole, their own included, is not on that account the less entitled to the character of positive law, even to them.

Such is the direct aspect of the matter, and it is in this consideration that all compulsory legislation and jurisdiction find their immediate justification. If the concurrence of the convicted criminal, or the unsuccessful litigant, in the sentence of the judge, were the condition, *sine quâ non*, of its execution, positive law would be an idle name.

But this is only the primary aspect of the matter. It by no means follows that, even in what thus appear to be exceptional instances, volition is not present as a source of law. There is such a thing as normal and general, as opposed to special and exceptional, assent, just as there are normal or general, as opposed to exceptional and special impulses. It can scarcely be said that the patient assents to the actual wrench by which the dentist quenches rebellion, and gives victory to law. And yet the justification of the dentist for the application of *vis major* from without rests not only on the fact that he has vindicated order and realized liberty, but that he has done so with full concurrence of their recipient, and even by his positive instructions. And precisely in the same way, though the infant, the imbecile, the criminal, or the politician who is out-voted at the poll, does not consent to the application of the law which takes place in his own case on the par-

ticular occasion, it is nevertheless fairly presumable that that law is in accordance with the rational will which governs his whole being, so far as his being is governed by a rational will, and, as such, is autonomous at all. There are few lunatic asylums which do not contain patients who have been placed in them, and are even forcibly retained in them, by their own normal, as opposed to their abnormal will; and many men have been punished, and some even hanged, in accordance with their own wishes. But we have seen that legitimate conquest can take place only on the ground of the conquered exhibiting characteristics analogous to those of infancy, imbecility, and criminality, or, at all events, being, as it were, fairly and on rational grounds out-voted by the conquering power; and as there is a general assent which the citizen of the world, who is *sui juris*, gives to its laws, just like that by which the citizen of the state binds himself to accept the laws of his national legislature, or the judgments of his national tribunals, even against himself, so there is a constructive assent on the part of the conquered province, which takes from the law imposed on it from without the involuntary and exceptional character which at first seems to belong to it. Directly viewed, it is law *to* the conquered state; but when we consider it indirectly and fundamentally, we perceive that it is also the law *of* the conquered state. It is to this consideration, in addition to the inherent absurdity of plebiscites as a means of ascertaining the volition of a people, that the answer of Germany to the claims of the conquered provinces of France to be consulted as to their nationality, if good at all, owes its force. These provinces,



in the frame of mind in which, as part of the French nation, they then were, were not autonomous communities; and *their own positive law*, their normal, and as such their real will, was more likely to be realized by attending to their race, their past history, and their geographical position, than by listening to anything they might say directly. Their real will was to be governed well—*i.e.*, with a view to the ultimate ends of all government; their apparent will was to be governed by France—whether well or ill. I offer, of course, no opinion on the fact; but I think it will be apparent that the possibility of their having gained, in place of lost, their autonomy by their conquest, is not formally excluded by the circumstance of their being made subject, in the first instance, to law that flows, apparently at least, from an external source. The allegation that they have been made free against their will, and powerful by being placed under subjection, is not formally absurd, and can be refuted only by an appeal to fact.

(c) *Positive law can spring only from the whole autonomous community which obeys it.*

Just as we have seen that natural law is the enactment of our whole normal nature, and not of any special or exceptional faculty called conscience,<sup>1</sup> so positive law must be the enactment of the whole autonomous community which obeys it, and not of any special or exceptional class, high, low, or intermediate.

Theoretically this proposition scarcely requires illustration, for if all law must be voluntary, it is plain that law which a portion of the community has not willed, either proximately

<sup>1</sup> *Ante*, p. 186 *et seq.*

or ultimately, either directly or indirectly, is no more binding on it than if it were the law of a community with which it had no local connection. The only legitimate ground, then, of exclusion from the rights, and exemption from the duties and responsibilities, of legislation, is want of power, which in this connection is convertible with want of reason, or, as we more commonly say, incapacity. It is for this reason that tests of incapacity, rather than of capacity, have hitherto been the battle-fields of politicians. Capacity is presumed till incapacity be proved. The questions which arise thus have reference not to principles but to facts, which necessarily vary not only with every community, but within every community at different periods; and their consideration, consequently, does not belong to our present subject.

But in addition to this theoretical consideration, there is a practical consideration which very strongly illustrates the necessity of positive law springing from the whole autonomous society. Partial legislation affords no measure of the power and reason of the portions of the community which it puts to silence, and consequently it offers no guarantee for its accordance with the stage of development to which the community has attained. It is thus not the disfranchised class alone that is a loser by its disfranchisement. The community is deprived of its means of self-measurement. If legislation proceeds from the more enlightened classes, it will be above the reason of the community, as a whole, and beyond it; if it proceeds from the less enlightened classes, it will be below the reason of the community as a whole, and behind it. If it proceeds from the so-called middle class, it

may, no doubt, correspond to the whole community.<sup>1</sup> But then what is the middle class? where does it begin, and where does it end? To discover tests of incapacity which relegate its subjects to the position of pupils, may be difficult; but to discover tests which shall guarantee one class to possess the capacity of interpreting and representing all classes is, I believe, impossible. If the community is to be governed by its own will, that will must actually be uttered by it, as an organic whole. Theoretically there is no ultimate answer to the claim for universal suffrage; and as the separation of sound practice from sound theory is impossible, it must be a subject of abiding regret that the practical recognition of this claim has been rendered incompatible with order and freedom by the insane outcry for equality with which, even in this country, it has been, and, I fear, may again be combined.

*(d) As the presence of positive law is proportioned<sup>2</sup> to the existence and coincidence of power and reason—or, in other words, to the existence of real as opposed to apparent power, in the whole community—the contributions which the individual members of the community are in a condition to make to it will be proportioned to the existence and coincidence of power and reason, or the existence of real power, in each of them.*

That it does not fall within the province of jurisprudence

<sup>1</sup> And what is true of legislation intellectually is equally true of it morally. Who can be so unjust to the American nation as to suppose that, though resting on a *régime* of democratic suffrage, it is fairly represented either by the fools who impose a protection tariff, or by the scoundrels and paltry jobbers who recently plundered its exchequer, and would fain have repudiated its obligations?

<sup>2</sup> As to the respective functions of equality and proportion in jurisprudence generally, see *ante*, p. 402 *et seq.*

to reverse the fact of natural inequality amongst men, has already, I trust, been sufficiently established.<sup>1</sup> So long, then, as men continue to be unequally endowed with power and reason, whether such inequality proceeds from inequality of gifts or inequality of culture, positive law must not demand that they shall contribute equally to its formation, or intrust to them equal rights and impose on them equal responsibilities, in interpreting and enforcing it. In this, as in all other directions, it holds true that "unto whomsoever much is given, of him shall be much required," and *vice versâ*. Just as we saw that the proposition that all men are equally men did not involve the proposition that all men are equal men, so now we see that the proposition that all citizens are equally citizens does not involve the proposition that all citizens are equal citizens, or that because all citizens ought to be voters, all voters ought to be equal voters. The "judgment of Zeus" was not reversed by the French Revolution.

#### CHAPTER IV.

THE DOCTRINE OF THE NECESSARY SOVEREIGNTY OF THE RATIONAL  
WILL OF THE WHOLE COMMUNITY IS IN ACCORDANCE WITH  
THE COMMON-SENSE OF MANKIND.

That true doctrines with reference to human affairs, at the stage of historical development which we have reached, can never be new doctrines—that in this department of inquiry,

<sup>1</sup> *Ante*, p. 375 *et seq.*

at all events, no "scienza nuova" is to be looked for,—is a remark which we have often had occasion to make, and which, I trust, we have often verified. In the present instance the reader may consequently feel entitled to call on me to prove the soundness of my assertion that the rational will of the community, as I have explained it, is the necessary source of positive law, by showing that, more or less definitely, that opinion has received the assent of mankind. To say that legislation has ever conformed to it, would be to claim for human enactments a character which their results have too plainly belied. But if we recall to memory the most progressive periods in the history of those nations which are emphatically called historical, I think we shall have little difficulty in perceiving that it is then and there, pre-eminently, that this principle has been accepted as the basis of legislation; whilst in our own political practice, following more immediately that of Holland, it has been consciously and professedly, though not consistently, acted on for nearly two centuries. Even in countries and at periods of history in which the practical supremacy of the rational will has not been recognized, so strong has been the feeling that by means of it alone reform was to be sought, or progress hoped for, that there is perhaps no condition of external circumstances, no form of government, under which its validity has not been consciously or unconsciously maintained. Lieber, in his ingenious and interesting work on *Political Ethics*,<sup>1</sup> has given a curious enumeration of writers of every shade of creed, posi-

<sup>1</sup> *Manual of Political Ethics*, by Francis Lieber, p. 297 *et seq.*



tion, and opinion, from Father Persons the Jesuit to Frederick the Great, who have distinctly recognized the sovereignty of the general will. It is Sir William Hamilton's "Cloud of Witnesses" to the universality of the Philosophy of Commonsense, recalled and examined regarding their political creed. Singularly enough, Lieber has omitted from his list the names of two of the very greatest of his own countrymen, Kant and Savigny; and I think we cannot do better than select them ourselves, not on account of his omission or of their pre-eminence in their respective departments alone, but from the importance which belongs to the fact of their having arrived at the same result by methods directly the opposite of each other. Guided by a method independent, and with the single exception which I have already indicated,<sup>1</sup> almost defiant of experience, Kant thus fixes the necessary centre of sovereignty. "The legislative power," he says, "can belong only to the united will of the people. Thus it is that, as all justice proceeds from this will, it is impossible that it can do injustice to any one by the laws which it may establish. So long as one enacts for another, it is always possible that he may do him injustice, but never so where he enacts only for himself (for, *volenti non fit injuria*)." <sup>2</sup> And again: <sup>3</sup> "The sovereign (legislator) cannot be, at the same time, the governor (regent), because the latter is subject to the law, and consequently lies under obligations to another — *i. e.*, the sovereign. The sovereign can take from the governor his power, can depose him, and reform his administration, but cannot punish him." The same doctrine

<sup>1</sup> *Ante*, p. 296.<sup>2</sup> *Rechtslehre*, part ii. sect. 46.<sup>3</sup> *Ib.*, sect. 49.

pervades the whole of that portion of Kant's work in which he treats of the sources of positive law.

Nor is the necessary sovereignty of the rational will less clearly or unreservedly acknowledged by Savigny as the result of the historical method of tracing out political and legal principles, of which he may be regarded as the most eminent representative. "In the common consciousness of the people," he says, "lives positive law."<sup>1</sup> . . . "It is the spirit of the people, living and working in each individual, which generates positive law; and which, consequently, for the consciousness of each, is one and the same law, not accidentally but necessarily."

Savigny by no means confines this doctrine to the generation of those laws by which the private relations of individuals are governed, and which come more directly within the scope of his treatise. He tells us, on the contrary, that the source of private and of public law—of law in the sense in which it deals with the relations which subsist between the individual members of the community, and that which assigns to the citizen his position with reference to the state—is the same. "Do we inquire into the origin of the state? we must seek it in a higher necessity, in a power which acts from within, just as in the origin of law in general; and this holds true, not as regards the existence of the state in the abstract, but with reference to the particular form which the state assumes amongst each particular people; for the generation of the state is, in a sense, the generation of the law—indeed, the highest form of the generation of the law." According to this view,

<sup>1</sup> "In dem gemeinsamen Bewusstseyn des Volkes lebt das positive Recht."—*System*, vol. i. p. 14.

the rules by which public relations are governed, and the institutions in which they find expression, and by which they are upheld, are as much the result of a pre-existent common feeling of what is right in the abstract, and expedient with a view to the vindication of right in the particular instance, as are the laws by which it is sought to maintain for each individual what common consent or judicial sentence has pronounced to be his private rights ; and thus it is that this doctrine, as I have said, directs us to the source alike of private, of public, and, I will add, of international law. Nay, farther, it indicates very clearly the means by which their development can alone be attained ; for, legislation being the result of the spirit of the community which it governs, to endeavour to regulate this spirit by legislation is to mistake an effect for a cause.

In saying this, it is far from my intention to question a fact so frequently and unequivocally established by experience as that the character, even of an independent nation, may be modified by influences from without. The political world is as sensitive as the Stock Exchange. When a monarchical revolution takes place republics become "a dull inquiry," and *vice versa*. So intimate is the relation, and so close the interdependence of the civilized nations of the world, that it is scarcely possible for a revolution of opinion, even though it should not be accompanied by a change in the form of government, to take place in one of them, by which the others shall not be more or less affected.<sup>1</sup> Their thoughts are so linked

<sup>1</sup> Of this we see interesting illustrations in the effects produced on Continental opinion by our own general elections.

together, that if the change has been in the direction of truth—by bringing positive law more closely to correspond to the dictates of our normal humanity—a step in advance will have been made by the whole civilized world ; whilst, on the other hand, if it has been in the direction of error—by the establishment of a positive law which runs counter to nature—mankind, as a whole, will have gone backwards. If, as is too commonly the case with such movements, the change has exhibited both truth and error, there will have been a gain in one direction and a loss in the other which may possibly for a time leave the question of progress or retrogression a subject of dispute. But as regards external influences, there is a wide difference between the cases in which they appeal to the spirit of a people, even by means of the most violent and noisy propagandism, and those in which they directly attack their institutions. Where the latter occurrence takes place, the links which connect the positive laws of a people with their national spirit are broken ; their legislation is transferred from a native to a foreign source ; and whatever may be the effect of the change on the liberty of the individual citizens for the time being, or even on the ultimate liberty of the nation, its separate political life, so far, is at an end. Nothing of all this occurs in the case of an appeal, however urgent, to the national spirit ; for our convictions are our own, however we may have formed them, and the laws in which we embody them are our own laws. But though it is by appealing to the national convictions, and thus moulding the national will, and not by attacking national institutions directly, that the positive laws of a people can alone be legitimately affected

either by external or internal influences, it is needless to deny that the process has often been practically reversed, and that a change in the national will—nay, even the renunciation of a separate national will altogether—has resulted from a direct attack on national institutions. The effects of such an attack will be permanent only when, and in so far as, they realize a higher liberty than that which they sacrifice. But even where there is no reason to credit them with this ground of permanence, that they may be very enduring requires to be established by no more recondite fact than that no small portion of Europe, after having been Protestant, was, during the course of the seventeenth century, dragged back by external influences into the Roman Catholicism in which much of it has since remained. But the general assertion is not affected, that for the spirit of a people to *follow* their institutions is at variance with the natural course of events, and that without a sacrifice of independence such an occurrence is next to impossible. In free states positive law is possible only to the extent to which it is an expression of the social influences which lie within the community,—of the moral forces which are at work in it.

We must not suppose that in all cases those writers who have enunciated, or those legislators who more or less fully have recognized, the supremacy of the general will, have formed to themselves clear conceptions of its constituent elements. There is, on the contrary, no subject of scientific politics with reference to which so much confusion of thought and in consequence of action has prevailed. Still, when the opinions of such men as Kant and Savigny, and the higher



class of political thinkers are in question, we must positively understand that by the expressions "rational will," "spirit of the people," "common consciousness," "state-conscience," and the like, they are very far from meaning the will or even the conception of right and wrong of the numerical majority, or even of the whole inhabitants of the state as an inorganic mass of equal individual units. From Savigny's words, which I have quoted, it will be readily gathered, even by those who know less of his position than I may presume most of my readers do, that he was no democrat; and Kant, it is well known, regarded democracy—which he was careful to distinguish from republicanism—as the only form of political existence by means of which the realization of the aspirations of the general will is impossible. Hegel is equally emphatic to the same effect.<sup>1</sup> It was on this ground that he expressed his distrust of our legislation in 1832; and had he lived to 1867, there can be little doubt that his disapproval of a second recognition of the supremacy of mere numbers would have been still more emphatic.<sup>2</sup> The substitution of household suffrage for a simple lowering of the money franchise was no doubt a very clever cutting of the democratic cards. It even

<sup>1</sup> *Philos. of History*, pp. 265, 266, 274, 463, 468.

<sup>2</sup> Was the provision that the members of the Reichstag should be chosen by universal suffrage and ballot introduced into the constitution, first of the North German Confederation, and then of the Empire, in the interests of liberty or in the interests of the Leviathan? The subsequent provision that the Chancellor and other officers of the Executive shall not be responsible for their actions, either to the Federal Council or to the Diet of the realm, but only to the Emperor, seems to render the answer very doubtful; and one cannot but regret that the old Teutonic system of the double vote and graduation, by proportioning the number of voters to the amount of taxes paid, which is followed in the constitution of Prussia, was not retained in that of the Empire.

introduced an element of permanence which, when taken along with the indirect influences of an historical and highly organized society, may perhaps protect us long against anarchy, and render progress possible in everything *except politics*. But it introduced no principle which can bring us nearer to the solution of the ultimate problem of politics—viz., the supremacy of the reason of the whole community. The error of equality remains untouched; and it is only to the indirect influences exerted by intelligence and wealth that we can look for ultimate perfection against anarchy or Cæsarism. We have thrown oil on the waters in place of mending our ship, and are consequently far too dependent on fair weather. It is no doubt very encouraging to find that, hitherto, the numerical majority in this country has shown no disposition to throw off the leadership of the cultivated classes, and it is possible that a stage of political development may be reached by the whole people at which inequalities will be voluntarily recognized more accurately than they could be measured by positive legislation.

Even French writers have not been wanting to warn their countrymen against the delusion of absolute equality which has cost them so dear. “The national will,” says Sismondi<sup>1</sup>—“that is, the sum of all the wills, of all the intelligence, of all the virtue of the nation, a sum in which each quantity counts for what it is, and negations count for nothing—is almost always absolutely opposed to the doctrine of universal (and equal) suffrage, which makes those who have no will prevail

<sup>1</sup> It is scarcely accurate to call Sismondi a French writer; but he was, at any rate, a writer in French whose works were widely read.

over those who have, those who know nothing of what they are deciding upon, over those who know it.”<sup>1</sup> It is quite consistent with this definition of sovereignty, and is indeed contemplated by it, that the sum of rational influence, the aggregate of real will of which sovereignty consists, instead of coinciding with, should stand over against the sum of individual opinions ; that the minority should *outweigh* the majority, and that the institutions of the state, the positive law of the land for the time being, should be in accordance with the opinions of the former, and at variance with those of the latter. As regards the individual, whatever may be the amount of influence—which, for practical purposes, we must assume to be the measure of reason—which he possesses amongst his fellow-citizens generally, whether it be greater or less than that of the average social unit, it is to the exercise of that influence in determining the public and private laws by which he himself is to be governed, and to nothing more, that he is entitled. If, then, the rational utterance of one man be ten times as definite and powerful as that of another, the fact that he contributes ten times as much to swell that general voice of which positive law is the expression must in some way be recognized.<sup>2</sup> And what is true of the privileges is equally true of the responsibilities of the individual. He is bound to share in the duties to the same extent to which he shares in the

<sup>1</sup> *Essays*, English trans., p. 291.

<sup>2</sup> The fault of all the schemes for improving representation from a democratic point of view—a fault from which even Mr Hare’s, by far the most ingenious of them, does not seem to be free—is that they aim at giving equal value to reason and unreason, to sense and nonsense. Even so rude a measure of intelligence, and, I will add, of character, as is offered by the payment of direct taxes, would probably be better than no measure at all.

rights of sovereignty. He must contribute according to his means, not only to the material but to the spiritual wealth of the state; and one of the most direct forms in which the latter duty behoves to be performed is by striving, with such might as may be in him, to bring its positive laws into conformity with the dictates of normal humanity,—with natural law.

## CHAPTER V.

### OF THE SECONDARY SOURCES OF POSITIVE LAW.

*The secondary sources of positive law, as already said,<sup>1</sup> are the means by which the community vindicates its real as distinguished from its merely apparent power, or, in other words, asserts its rational will.*

Anything approaching to an exhaustive treatment of the secondary sources of positive law would manifestly lead us into the discussion of subjects which, though belonging legitimately to public law, lie beyond the scope of a treatise on the principles of jurisprudence. We shall consequently content ourselves with little more than an enumeration.

#### I. *The means by which the community forms its rational will.*

By the formation of the rational will, as opposed to its development, I mean the bringing it, on the part of the community generally, sufficiently near to the point which it has reached in the exceptionally cultivated classes, to enable the

<sup>1</sup> *Ante*, p. 426.

community, as a whole, to take part in legislation. This function, in the modern world, is chiefly performed by four great institutions—viz., the Church, the school, the press, and the polling-booth.

1. *The Church.*

By the Church is here meant, not the whole body of the faithful, nor yet any particular ecclesiastical institution, but the whole organization by which popular oral instruction on religion and morality is communicated, and by which divine influences are invoked. The great obstacle to the activity of the Church as an instrument for the farther discovery of truth, and that which keeps it down to the level of an organ for the dissemination of truth already known, is the necessity for its dogma being fixed by some definite symbol. This necessity—which, though greatly exaggerated, is to some extent real—exists equally in established and endowed, and in disestablished and disendowed Churches; whereas the latter are depressed, in addition, by the dependence of the clergy on the people—the teachers on the taught. An endowed Church is conceivable in which the clergy, like the professors in the Theological Faculty of an endowed University, should be permitted to seek for divine truth as freely as the lay<sup>1</sup> professors of en-

<sup>1</sup> It may not be generally supposed that the freedom of lay teaching is dependent on endowments, but such unquestionably is the case, and this not in universities only, but in schools. All teaching that depends on popular support must court popular sympathy by conforming to the “rage” of the time, as is done in “adventure schools.” Were it not for the protection afforded to learning and philosophy by permanent endowments and traditional examinations, we should have little teaching of anything at present except physical science. The vast amount of intellectual activity that is expended on history and comparative philology is not the spontaneous product of this generation; and its



dowed Universities are permitted to seek for secular truth ; and the only objection to such a Church seems to be that its teaching, by becoming individual, would lose the weight which belongs to it as the result of the consent of many minds. But an unendowed Church, or even congregation, in which the clergy enjoyed this amount of freedom could never exist as a permanent institution. A few exceptional individuals might, at times, contrive to impose their own opinions on their hearers ; but if these differed at all widely from prevailing beliefs, their positions would always be insecure, and it would be too hard a trial for the sincerity or the activity of most men to tell them that they might seek truth, but that if they found more of it than other people, other people would deprive them of the means of living. Creeds are positive laws—*i.e.*, they are human interpretations of divine revelations.<sup>1</sup> The remedy, as in the case of other positive laws, seems to consist, not in the total abandonment of ecclesiastical symbols, but in their respectful criticism and frequent though cautious revision, so as always to maintain the dogma of the Church, as nearly as possible, on a level with the scientific theology of the period. But the functions of criticism and revision call into play opposite mental tendencies, and will seldom be satisfactorily discharged by the same individuals, or even by the same generations.

full value will be appreciated only by the generations of philosophers and poets who, we must hope, will bring thought and imagination to bear on the precious inheritance of knowledge that will descend to them. It is only by means of endowments, the immediate “utility” of which is rarely appreciated, that the continuity of the intellectual or religious life of a people can be preserved, and it is only by being thus historical that it can be progressive.

<sup>1</sup> See some excellent observations on this subject in Mr Herbert Spencer's *Study of Sociology*, p. 309.

Notwithstanding the difficulties which thus impede its freedom, it must be remembered that the pre-eminence of the Church, as a means of forming the rational will, rests on various considerations by which it is distinguished from all other teaching institutions.

(1.) The Church alone seeks to influence the will, not only indirectly, through the understanding, but directly, and this in two ways—

(a) By supernatural, though not on that account preternatural, means, which are commonly spoken of as “means of grace.”

The efficacy of the sacraments in restoring the union between the divine and human elements of our nature, partially destroyed by voluntary transgression, is a subject on which it would not be becoming that we should here enlarge. But as jurists and politicians, it is proper that we should remember that prayers for the coming of God’s kingdom are neither more nor less than prayers for the union of power and reason in His creatures; and that the extent of their influence will be proportioned to the sincerity with which they are offered. When such prayers degenerate into formalities, their influence will sink to almost nothing. On the other hand, it is quite conceivable that they should be animated by a faith so strong and general, as to bring a whole nation into relations to the Divinity of so close a kind as would almost counteract the influences of human wickedness and folly. “Knock, and it shall be opened to you,” is a promise not limited to individual supplications, nor is it individual faith alone that may “remove mountains.”

“ More things are wrought by prayer  
Than this world dreams of. Wherefore let thy voice  
Rise like a fountain both by night and day.  
For what are men better than sheep or goats  
That nourish a blind life within the brain,  
If, knowing God, they lift not hands of prayer  
Both for themselves and those who call them friends ?  
For so the whole round earth is every way  
Bound by gold chains about the feet of God.” <sup>1</sup>

But it is the divine element in humanity alone which can approach the Divinity, and the divine element is the rational element by which, more or less perfectly, we apprehend the conditions of our existence. In our prayers we must consequently be guided by the reason which God has bestowed on us, and the experience which He has permitted us to acquire. To pray for the alteration, modification, or even the temporary suspension of what we know to be His laws, would not be reasonable prayer: first, because reason forbids the supposition that He will change what, being in accordance with His perfect will, is already perfect; and, second, because experience, though its teaching never rises above probabilities, does, in this case, certainly render it in the highest degree improbable that He will so act. But there are laws which, though immutable, are not inviolable; and it does not follow from their immutability that the deepest wisdom may not lie in praying that we, and others whose knowledge and wills are confessedly imperfect, should be enabled to know these laws more perfectly, and to conform to them more completely. To take an example in point: though every democrat

<sup>1</sup> *The Holy Grail*, p. 155.

now in existence—nay, though the whole human family till the end of time—were to pray that all men should be made equal, there would be no more chance of that prayer being heard than if they were to pray that they should be made immortal. But if one righteous man were to pray that he and others might be led to accept the inequalities which God has ordained, and to employ them for social and political purposes, there is no saying to what extent that prayer might avail. Nor, accepting the perfection, notwithstanding the mystery which surrounds the dealing of God with His creatures, is it difficult to see that it is this form of prayer alone which, for our own sakes, we can *logically* present. To pray for the alteration of laws which we assume to be perfect, is to pray for evil; whereas to pray for power and will to conform to such laws, is to pray for that which alone is wanting to our good; and the act of offering such a prayer is, in itself, no unimportant step towards its fulfilment. To pray that sin, whether past or present, may be no longer sin, and that we may be pardoned, in that sense is to throw breath away; but to pray that we may be pardoned in the sense of ceasing to be sinners, is already to be sinless so far; and the frequent repetition of such prayer may end in the formation of habits of comparative sinlessness, or, in other words, of voluntary conformity with God's laws.

(b) By natural means. The method of touching the will by appealing to the heart belongs especially, though by no means exclusively, to the Church.

The function of the Church is not only, or even so much,

to disseminate truth, as to prepare the soil for its reception, —to teach tractableness. Of the necessity of this preparatory process any one may convince himself by observing the very slight effect which a *reductio ad absurdum* of their opinions produces on the vast majority even of educated men. Political and social hallucinations, having their roots in selfishness and vanity quite as much as in stupidity and ignorance, present, in a conspicuous manner, the pitiful spectacle of the will bidding defiance to the reason. As regards them, above all, it is true that—

“ A man convinced against his will  
Is of the same opinion still.”

Here, then, we must approach the reason by the will, and not the will by the reason, and the proceeding is one which belongs to the ecclesiastical rather than to the scholastic or academical instructor. It is in place in the Pulpit; but it would be wholly out of place in the Chair.

(2.) The Church appeals to the classes that are least within the reach of other influences, and retains its hold on them during life.

It is with the spiritual interests of the working classes, more especially, that the Church is concerned. To the classes whose position and occupations enable them to command leisure, even Christian influences come from many other quarters, and their spiritual life is fed by a thousand rills. But to the children of toil, the Church and its ministers offer almost the only incentives to reflection. Of the small measure of leisure which is theirs, a very large portion is spent in immediate contact with the influences



which she wields, and, for good or for evil, these exercise a very important effect on their characters and lives. Any one who considers how different is the *rôle* which the Sunday plays in the life of the man of labour and the man of leisure, and who knows how much more exclusively the views and opinions of the former are the result of pulpit teaching than those of the latter, will have a practical illustration of what we mean. Now, that such teaching should deal directly with political interests, even when these are seen from the most all-embracing point of view, is, of course, neither possible nor desirable. Still, so to expound Divine law as to set the current of popular thinking in the direction in which sound human laws are to be found, does seem to be entirely within the Church's province, and we see no reason why this should not, at times, be done a little more explicitly than merely by dwelling on the general fact that moral and religious principles form the basis of citizen life.

There are phases and habits of rational secular thought and feeling, to the formation of which the clergy, even in their strictly clerical capacity, may very well contribute, which will set limits at once to arrogance and insolence, and out of which just conceptions both of the active and the passive duties of citizenship will spring almost inevitably. There are necessary relations—such, for example, as that between rights and duties—which, even as abstract doctrines, may be popularly expounded from the pulpit, and which, if once apprehended, without any special application to existing circumstances at all, will very soon and

very surely bear practical fruits. The political effects of the social relations of parent and child, husband and wife, and the like, may be pointed out, and the political necessity of accepting the teaching of nature in its integrity may be insisted on.

In many passages of our own history we have examples of the happiest and most important secular results which are referable directly to the pulpit exhortations, and to the more private influences, of the ministers of religion. I shall have occasion presently to speak of the suggestive character of Wickliffe's teaching and that of the later Reformers, in secular directions. To come nearer to our own times; it was the teaching of their pastors (narrow and ungenial as it now appears to us) which supported Independents and Presbyterians in their political as well as in their religious struggles, and which, by the hands of the Puritan Fathers of New England, laid the foundation of the most fruitful colonial life that the world has ever seen. Looking in another direction, it is impossible to say to how great an extent that reverence for existing institutions, which, breathing through the whole of the liturgy of the Church of England, reminds one continually of Queen Elizabeth's days, may have tended to foster in the English people those conservative instincts which characterize them even as contrasted with the Scotch, and which, in the absence of conscious reason, have so often been the safeguards both of order and liberty.<sup>1</sup> In Roman Catholic

<sup>1</sup> Of the influence of religious feeling in secular directions we had a memorable instance in the effect of the National Thanksgiving for the recovery of the Prince of Wales in putting to silence the demagogic outcry against monarchy.

countries the influences of the Church have unhappily been too often placed in antagonism with those of the State. But however much we may deplore the use which has been made of them, it is impossible to question their efficiency, and we should be strangely unjust if, in dwelling on the reactionary and retrograde tendencies which they at present exhibit, or the disbelief and disobedience which they indirectly engender, we failed to remember how often they have formed the only check on despotism, or the only mitigation of anarchy. Still in identifying political and ecclesiastical, secular and religious interests, the advantages of Protestantism must always be very great;<sup>1</sup> and whereas the political, like the religious atheism which has overtaken so large a portion of the Roman Catholic world is in no small measure traceable to the abuse of clerical influences, I doubt whether, at this moment, sound doctrine in politics and jurisprudence finds anywhere more efficient supporters than in the Protestant clergy of Europe and America. But their aid might, without difficulty, be rendered still more efficient; and in the present crisis of the history of mankind, I believe the Church could find no nobler function than to trace out and exhibit the secular applications of the Sermon on the Mount, and to insist on its universally human character.

But, in order thus practically to influence the general will, there is one principle which it is, above all, indispensable to keep in view. Christianity must be regarded as inculcating not what is negative merely, but still more prominently what

<sup>1</sup> *Le Protestantisme et le Catholicisme dans leurs Rapports avec la liberté et la prospérité des Peuples*, par M. de Laveleye, 1876.

is positive in human conduct. The womanish view so often presented of Christianity by those who profess to expound it, and the disposition to regard it as a mere string of prohibitions, not only tends to enfeeble the characters of those who accept this as the true exposition, but has the farther and greater evil of driving the manlier characters who reject it to seek their exemplars and rules of conduct elsewhere.<sup>1</sup> And this effect is more than ever to be apprehended now that Christianity has been brought in contact not only with philosophy, but with the older and less perfect, though in many fundamental respects identical religions of Asia, and more particularly of the Aryan races. We are only at the beginning of a movement, in itself I believe eminently religious, but of which the effect must be to weaken the hold of Christianity on those who regard it as consisting either of exceptional dogmas or ritualistic observances. And this unhappy result, not unknown in Protestant countries, is most of all conspicuous where, as in France, the worship of the Virgin has all but supplanted the worship of God. It is this feeble and limited conception of Christianity which in Roman Catholic countries has so often ranged the manhood of the nation in opposition to the Church. If the doing of important and noble duties, rather than the abstaining from petty and ignoble vices, were insisted on, even the latter object would be attained far more effectually; and

<sup>1</sup> Τῆς ἀρετῆς γὰρ μᾶλλον τὸ εὖ ποιεῖν ἢ τὸ εὖ πάσχειν, καὶ τὰ καλὰ πράττειν μᾶλλον, ἢ τὰ αἰσχρὰ μὴ πράττειν, Aristot. *Ethic.*, lib. iv. c. 1. Xenophon tells us that one of the facts alleged by the accusers of Socrates was that he was in the habit of quoting this line from Hesiod, "Ἔργον δ' οὐδὲν ὄνειδος, ἀεργεῖη δὲ τ' ὄνειδος. Socrates was far from repudiating the imputation; and no one who feels, like him, the higher dignity which belongs to a teacher of active virtue, will shrink from bearing it along with him.

if the motive were made not the hope of escaping punishment, but the certainty of attaining the love and favour of the Most High, Christianity would be placed in a truer and far more attractive light. In place of limping after us like a senile monitor, in whose eyes the small and the formal is of greater importance than the great and the substantial, Christianity would become, as it was intended to be, a fresh and ever-youthful leader wherever our effort was to do God's will on the greatest scale, and our abiding support and consolation, when, in order to do so, the tangled maze of circumstances imposed on us the necessity of violating the immediate dictates of humanity or the promptings of instinct. Nowhere more than in their citizen capacity, so long as there is sin in the world, must men stand in need of this positive view of Christian duty. Not only to those who guide, but to those who execute the volitions of a whole people, the place of Providence on a limited field is assigned; and he who, with merely passive Christianity to support him, is called upon to draw the sword, to erect the scaffold, or to perform any of the sterner duties of citizenship, must do so either without reference to Christianity at all, or, what is worse, in violation of what alone he has been taught to regard as its dictates. The moment we are called to deal actively with public relations, our Christianity must be of such a kind as to raise us above all minor anxieties, and in the most trying circumstances to give victory to law. Where the voice of duty pronounces unmistakably for vigorous and unsparing action, he who represents the Word of God as prescribing childish inactivity or feminine submission, however harmless may be his intentions, will in his



deeds be at once a traitor and a false prophet. Nor, on the other hand, will he be a truer interpreter who, recognizing the paramount claims of duty, represents these as incapable of any genuine recognition which is not accompanied by a perpetual austerity, and in constant conflict with all that is humane and genial in the ordinary relations of life. Whilst our Divine Master has told us that He brought into the world "not peace, but the sword," we know that the very first object for which He interrupted the ordinary laws of nature was to provide more abundantly, not for the wants, but for the convivial enjoyments of those who, for the time, were His companions in mirth. Had nothing else to the same effect been recorded of Him (and there is much), in this one saying and this one act we should have had abundant proof that His notions of Christian duty were neither sickly nor sour. It is in the more wholesome and encouraging conception of the human relations which, when truly interpreted, Christianity presents, more than in anything else, that it surpasses the older religions of mankind.

2. *The School, including the University, in so far as the latter is regarded merely as a means of instruction and discipline, and not as an organ for the advancement of science.*

Education being the development of man as a rational being, that the autonomous character of a community will, on the whole, keep pace with its educational advancement, is a proposition the acceptance of which I shall take for granted. It is true that education alone is neither the only source nor the only measure of autonomy. There must be something to educate; and as communities, like men, do not all start

with the same aptitudes, the same amount of instruction, or even of experience, will not bring them all up to the same point. England, in the days of Simon de Montfort, was a more autonomous country than France is perhaps even now, or at all events was till very recently; and yet it cannot be doubted that France has long had a far wider range of instruction to guide her than England had then, and a far wider range of experience than England has yet, or, it is to be hoped, ever will have. Such differences are usually ascribed to race. That race in general contributes to them very largely is a conclusion which is placed beyond question by a comparison of the historical with the non-historical races of mankind; and that the difference between France and England may arise from the preponderance of Celtic<sup>1</sup> blood in the one, and of Teutonic blood in the other, is a conjecture which is forced upon us by the history of the different portions of our own population; and the same remark is applicable to the northern as compared with the southern provinces of France. Though there are some intellectual and even moral qualities which appear to be possessed by the Celtic in a higher degree than by the Teutonic race, their religious conceptions are always marked by that tendency to ecstatic delirium which characterizes the religions of the lower races;<sup>2</sup> whilst, secularly regarded, there is no historical example of a Celtic population which, by its own efforts, has thrown off the restraints of

<sup>1</sup> Bunsen holds the Celtic or Keltic tribes to be "the lower grades of the Aryan stock in Europe and Asia."—*God in History*, vol. i. p. 239.

<sup>2</sup> What are called "revivals" are very common in the west and north of Scotland, where the population is Celtic, but cannot be got up in the east and south, where it is Teutonic.

patriarchal government without falling into anarchy. Even on the limited scale on which republics have been found to work well with other races, they have hitherto been impossible where Celtic blood preponderated. There never was a Celtic "Free-town" or "Hansa;" and if M. Rénan should be correct in his view that the Celtic element in England is superseding the Teutonic element, there might cease to be a free England, as when he wrote there had ceased to be a free France. The prospect is a very sad one, but its political aspect ceases to alarm us when we remark how freely the Celtic mixes itself with, and loses itself in, other races, and how valuable it is as an ingredient in the composite stock. Of the subordinate position which it takes when brought in contact with other ethnological elements, the invariable disappearance of its language seems an infallible indication.

But even in the same country, and where the race has remained substantially unchanged, the relation between the advance of knowledge and autonomous power does not always hold good. It is true that Spain has by no means kept pace with the North of Europe in the race of knowledge. But even Spain can scarcely have failed to learn something—to make some advance on her own position in this respect—during the last 400 years; and yet it is certain that Spain has been a less autonomous nation—less orderly and less free—during the last half-century, than during any similar portion of the long period which elapsed between the victory over the Moors in 1212, and the union of the crowns of Castile and Arragon under Ferdinand and Isabella in 1479. It would be difficult, perhaps impossible, to obtain direct data as to the edu-

cational condition of Spain at the one period, and at the other ; but I think it may be taken for granted that the elements of instruction are now more widely disseminated, and if material prosperity be any guarantee for general intelligence, Spain has made great advances within the last fifty years.<sup>1</sup> The same may be said of France during the reign of Napoleon III., when she certainly was more prosperous and popularly instructed, but less autonomous than during that of Louis Philippe.

Now the explanation of the failure of the general relation between education and autonomy, in these and other instances in which it cannot be ascribed to difference of race, will be found, I believe, in the fact that it is not all education which tells in the direction of autonomy, but only such education as results in the discipline of the individual character, and, through the individual, of the national character. By discipline I mean, not only formal compliance with the arrangements of nature with reference to human relations, for that may be enforced from without, but voluntary acceptance of these arrangements as the true measures both of rights and duties. A man or a community that is disciplined, in this sense, is autonomous, because his or its will coincides with the necessary conditions of existence. He obeys no master except Him whose "service is perfect freedom," and whose will it is that he should be free, and, consequently, it may be said of him in the deepest sense, *Volenti non fit injuria*. And if we take the matter up historically, either as regards the nations I have mentioned, or any other nations, I think

<sup>1</sup> Is Spain now really becoming an autonomous nation? If so, the phenomenon will be one of the most interesting in political history.

we shall find that experience has not belied the conclusion that the men and nations that have most freely and fully accepted the laws of nature, whether revealed through nature or to nature—the most disciplined men and nations, the most moral and religious men and nations,—have been the freest men and nations.

This voluntary acceptance of the laws of nature may be either spontaneous and unconscious, or it may be the result of reason consciously exercised. In the former case, in so far as it is not dependent on special temperament, its source will be found in the organization of the family and of society, which to a certain extent is inevitable. In its rudimentary stages organization is thus the cause of that discipline of which, in its higher and more perfect manifestations, it is the result. The simplest instance of spontaneous discipline is the necessary relation of parent and child. Every child must stand in a position of dependence and subordination to its mother, or to the nurse who takes its mother's place. That is a lesson of discipline which no one can escape, and which no one resists; and it is the first step on the ladder of organic social life. Filial dependence, indeed, is the school of discipline which nature has provided, attendance on which she has rendered compulsory, and which she continues longer in man than in the lower animals, in consequence of the greater amount of teaching of which he stands in need. The same is true of relative inferiority in all its stages and forms. As has been said of philosophy we may say of discipline: Man is disciplined as he lives; he may be disciplined much or little, well or ill, but disciplined he must



be. Life, in short, altogether is an educational institution, and this is true of it, not only in its ideal conception, but in its humblest manifestations.

But though the rudiments of discipline, as of philosophy, be thus taught by the inevitable conditions of human life, and will be learned better or worse in proportion as that life is higher or lower either in the individual or in the race, like philosophy, also, it may be taught, and in its higher forms can be taught, only by an appeal to that conscious reason, which is the characteristic peculiarity of man. And if this be so, the question with reference to the educational institutions of a country, viewed as sources of positive law, comes to be this,—is there any special kind of direct instruction by which this discipline can be attained, and if so, what is that kind?

Now here there need, I think, be no difference of opinion. The school, like the Church, must take this matter in hand openly and directly, as it does other matters. If you wish to teach a man to avail himself of the powers, or to conform to the laws of physical nature, you teach him the laws by which these powers act and react. If you wish to enable him to combine an acid with an alkali, we shall say, you teach him chemistry—the laws which govern the relations between material substances—and not jurisprudence—the laws which govern the relations between man and man. Just reverse this process, then, and when you wish to develop a social or political aptitude in him, give him social or political instruction. If you wish self-governing men, teach them how they are to govern themselves; but do not hope that they will

know how to govern themselves—and govern you too, for it has come to that—without teaching of any kind, or in consequence of your having only taught them to combine acids with alkalis, to make railways, or to spin cotton.

The objections which are made to this pretty obvious view of the question are, I think, mainly two: 1st, The natural laws of the human relations, it is said, do not admit of any precise statement, and consequently cannot be taught. I hope that I have already answered this objection in the preceding pages—if not, I cannot answer it. 2d, It is said that, at all events, they cannot be taught in a popular manner, and that all attempts so to teach them only stir questions of principle which cannot be adequately solved, and with which it is wiser and safer that men in general should not concern themselves. Now all popular teaching is necessarily imperfect; the knowledge which it communicates is incomplete; and no community which is led by it ever can be as safe, either from internal disorder or external disaster, as a community so organized as to take advantage of the best and highest light which political science has brought within its reach. A community which subordinates its higher to its lower reason imperils its stability as well as its progress, and I am far from contending that a considerable amount of danger will not always attend the practical application of such political knowledge as can alone be communicated to the numerical majority. But this argument loses all meaning in the mouths of those who advocate the dominion of the numerical majority, and all practical application to communities in which that dominion is already recognized.

Edged-tools will always be dangerous in unskilled hands ; but if men are resolved that edged-tools shall be put into unskilled hands, or if edged-tools have been put into unskilled hands already, the more skilful those hands can be made the less will be the danger. Petroleum and gun-cotton will never be safe commodities in all men's keeping. But if all men must keep them, and keep them too in equal quantities, the sooner such information with reference to the mode of handling them as all men are capable of receiving can be disseminated the better.

Nor do I see any reason to believe that popular teaching should necessarily be more imperfect or incomplete when it has reference to moral and social, than to physical laws, or indeed to any other branch of knowledge by which the higher faculties are called into exercise. The political education of all classes can no more be equalized than their education in other respects. But in a well-organized community the political education of all classes might be proportioned to their requirements—that is to say, to their rights and responsibilities ; and with this view the obvious rule suggests itself, that in proportion as the political influence of the individual rises, ought his citizen training to become wider in its range, and more scientific in its character ; or, reversing the proposition, that his political influence should be made dependent on the measure of his citizen training. The only difficulty which seems to stand in the way of such education being made compulsory on all classes<sup>1</sup> arises

<sup>1</sup> The old Scotch statute, 5 James IV. c. 54 (1494), which enacted that barons and freeholders should send their sons and heirs to the grammar-schools till

from the want of any legal recognition of classification in modern states. The objection to such recognition, which to many minds seems fatal, is the tendency which classes when so recognized would have to degenerate into castes. To me it appears that this objection would be obviated if this classification were recognized only for political purposes, and if the principle of *la carrière ouverte* were expressly maintained in it; as, for instance, by the adoption of a graduated suffrage, one of the conditions of admission to, and advance in which, should be education. Whether such organization as would lay the basis of a consistent system of compulsory political education has been rendered impossible by the democratic legislation which has already taken place in this and other countries, is a question which I cannot here discuss.

In the absence of an arrangement by which so many of our hardest problems would have been solved, the only means of enforcing political education of the higher kind seems to consist in rendering it imperative for admission to all Government appointments, raising its character in proportion to

“they be competentlie founded and have perfite Latine,” and thereafter to remain three years at “the schules of art and jure, swa that they may have knowledge and understanding of the lawes,” has always seemed to me a very enlightened provision; and as the opportunity of imposing an educational test on electors has been lost by the apathy and irresolution of the educated classes, it might perhaps still be possible in some measure to supply the place of it by imposing some such test on the elected. At all events the opportunity of prosecuting political education in a more systematic manner than is at present possible in this country, ought to be offered to our young politicians, and this can be best done, as it seems to me, by developing our “scholes of jure”—that is to say, the faculties of law in our Universities—on the political and legislative, as opposed to the professional and judicial side.

their importance. For admission to all the professions, and more particularly to the law, it ought unquestionably to be demanded; and this is a measure in the hands of bodies so obviously interested in it, that its adoption is not improbable. In Germany—a country from which we have still much to learn—the degree of Doctor of Laws, or some equivalent test, is required for admission to all the higher offices of the civil service of the State; and these tests imply instruction and examinations in scientific jurisprudence or natural law,<sup>1</sup> in politics, and in political economy.

But, even on the assumption that it was to be entirely voluntary—if direct political instruction of every kind, from the highest and most exhaustive which the Universities could communicate, down to the simplest and most obvious which need be no burden on a parish or even a ragged school, were to be sown broadcast over the land, I cannot doubt that it would speedily yield a rich harvest, not only of progress and safety, but of peace and goodwill. Great advantages have already resulted from the extent to which a knowledge of political economy has been disseminated in this country, partly by popular lectures, but chiefly by the newspapers. It is this knowledge, more than anything else, that has protected our lower classes, beyond those of other countries,

<sup>1</sup> In consequence of the ascendancy of the military and materialistic spirit, Germany, during the last twenty years, and more especially since the French war, has exhibited very little activity in the philosophy of law, or, indeed, in any branch of philosophy. In some of the Universities, I believe, the examinations in *Rechtsphilosophie* have been omitted, probably from the difficulty of finding competent examiners. For the present the philosophical mantle, which Germany wore so proudly in the beginning of the century, appears to have fallen on the shoulders of Italy.



from the delusions of communism, socialism, and other forms of political and economical error. But such benefits would be infinitely deepened if men in general could be taught in their youth not only that such schemes are unprofitable, or even that they are wicked, but that they are *impossible*; for the simple reason that they violate natural laws which are as unchangeable as those which govern the revolutions of the seasons, the flow of the tides, or the alternations of day and night. If the politician could expound the two words "necessary" and "impossible" in their political acceptance, as the economist has expounded the words "profitable" and "unprofitable" in their economical acceptance, our "reigns of terror" would be over. Such teaching would no doubt demand some philosophical, and more especially ethical, training, as well as a considerable acquaintance with history, on the part of the teacher. But, by any one so furnished, I am convinced that it could be communicated in a manner that would be perfectly intelligible and convincing, not only to every reasonable man and woman, but to every ordinarily intelligent child of ten or twelve years of age.

### 3. *The Press.*

When we speak of the press, in this relation, it is necessary to distinguish between the art of printing and publishing, when used for the purpose of developing or disseminating truth or error, and the act of printing and publishing when carried on as a mercantile speculation. In the former capacity the press is an instrument, the effect of which, for good or evil, will be proportioned to the power of him who wields

it. Its function is to represent new opinions, and its tendency will always be to go beyond the community in some direction; whilst in point of ability it will generally either rise above or sink below the general standard of thought and knowledge. Even the error which it teaches will not be altogether common error; and where it exercises any influence at all, that influence will be in the direction of developing or exaggerating existing opinions rather than of disseminating them. What may be called the mercantile press, on the other hand, which alone properly falls to be spoken of in this section, is the most efficacious means which the modern world possesses of popularizing and diffusing thought and knowledge; but its function scarcely rises higher. The question with its conductors, necessarily, is not "what is true?" but "what will pay?" and nothing will pay immediately which rises very much above, or pay at all which sinks very much below, the point at which the general intelligence stands for the time being. Publishers by profession, and those who seek their favour, are thus of necessity teachers, and not cultivators of science; and inasmuch as the mercantile value of a book is the best possible test of its value as an organ of instruction, publishers and booksellers, whilst consulting their own interests, are at the same time the most efficient managers of the press for mere teaching purposes. Where public taste is good, the books which they select, in point of form often leave little to be desired; they frequently contain new facts; and they exhibit familiar opinions, and even sparkling paradoxes, in brilliant language. But new, and as such, recondite thought, is necessarily excluded from them. Even thought

which is familiar in one country is scarcely ever introduced into another by the mercantile press, for the simple reason that the works in which it is embodied, even when translated, do not pay till, by academic teaching, or otherwise, they have become familiar. In addition to popular books, the mercantile press includes magazines, reviews, and other periodicals which are the property of publishers, even when conducted by "able editors"—with the partial exception of those which publish the names of their contributors—together with the vast majority of newspapers. From the immediate and marvellous increase in the quantity, and deterioration in the quality of its newspapers that takes place the moment that a nation sinks into anarchy,<sup>1</sup> it would almost seem as if autonomous reason were in an inverse proportion to the time and energy consumed in the production and perusal of this species of literature. And yet there is no other secular means of developing the popular reason which possesses half the efficacy of the newspaper press; and there is none which is, on the whole, more worthily used, in this country.

The other evils which to some extent counterbalance the many benefits which the mercantile press confers on the cause of civilization seem to be mainly these—

(a) From the zeal and energy with which popular works are pressed on the attention of the public, the success and to some extent the production of recondite and original works is interfered with. The greater activity of the learned press in Germany than in England, is in some degree to be accounted

<sup>1</sup> This phenomenon, I am told, is invariably exhibited in the South American States the moment that a revolution occurs.

for by the greater activity of the popular press in England than in Germany.

(b) The multiplication of secondary sources of thought and knowledge draws attention away from the primary sources, and induces men to follow inferior guides. In place of reading a little of standard works, most of us read a great deal about standard works.

(c) The amount of time and energy devoted to trivial and indolent reading, limits that which most men have at their command for meditation and reflection. The most commonplace persons are very often those who read most; and probably the dead level of character of which we all complain, and which most of us exhibit, is in no small measure due to the efforts requisite to keep up with what is called "the current literature of the day."

#### 4. *The Polling-booth.*

The mere exercise of the electoral suffrage is by many regarded as sufficient to confer the measure of rational will which its rational exercise demands. The proverb that "office makes the man," here above all, it is said, is true. I am far from denying either the truth of the proverb, or its bearing on the matter in hand. Practice is the best of schoolmasters, and the polling-booth is a very precious school of political instruction. It is in recognition of this fact that I mention it here amongst the means by which the rational will of the community is formed, though I regard its direct and primary function as being, not to form that will, but to measure it and declare it.

But granting its title to take rank as an educational in-

stitution, it is an error to suppose that, by the suffrage, or any other office or function, we can supply gifts by merely calling for their exercise. It is precisely the same error that is made in supposing that by multiplying examinations we supply the place of teaching. The Bench of Judges and the Bench of Bishops are both of them very sharp and efficient schools of instruction; but did any sane man ever propose to appoint a judge or a bishop in the hope that he would thereby be instructed in the duties of his calling? Even supposing the ultimate instruction of the individual to be an adequate return for the injury to himself and others which must arise from his inevitable failures in the first instance, this object would not be attained; for experience will no more supply the place of knowledge than sunshine will supply the place of seed. You can no more convert a mob into disciplined citizens by giving them the suffrage, than you can convert them into a disciplined army by giving them muskets; and we do not require to travel into the history of former times to convince ourselves, either that the dangers attendant on the two experiments are on a par, or that the one experiment has a tendency to lead to the other.

The reason why men fail to see, in the case of the suffrage, what is so obvious with reference to every other function, is that its exercise is regarded *only* in the character of a right. Men, it is said, have no right to be judges, or bishops, or soldiers, but all men have a right to be citizens, and to all the advantages which may arise from the exercise of citizenship. The error, like the opposite one of denying that it is a right altogether, arises from forgetfulness of the relation,



which we formerly discovered, of the inevitable reciprocity of rights and duties. We then saw<sup>1</sup> that there are no absolute rights at all, in the sense of rights, to which corresponding duties do not attach; and that if there be a failure of reciprocity as regards duties, it can only be in the case of the duties which we owe to the Author of our being. The two prevalent theories of the suffrage are thus equally erroneous, and from the same cause. Like all other functions that are legitimate at all, the function of citizenship is *both* a right and a duty, inherent in all who are capable of its exercise. It is inherent in them as a right in proportion to the extent to which it is a duty, but it emerges neither in the one character nor in the other till, nor beyond the extent to which, it emerges in both. On precisely the same principle lawyers and clergymen are entitled to preferment—men who are able and willing to defend the community are entitled to powder and shot; but in each case the right brings its corresponding duty, and continues dependent on, and measured by, its performance.

But these considerations, though they deprive the suffrage of the character of an educational institution, except for those who are already capable of its exercise, do not invalidate it, for those who are, as a potent instrument for the formation and development, as well as for the expression, of rational will. It has taught much in England; we must hope that it is at last beginning to teach something in France; and if graduated in proportion to capacity, it would have the farther advantage of acting as a very powerful stimulant to the use of the other means of progress.

<sup>1</sup> *Ante*, Book I. cap. vii., xi., xii.

But there is another ground on which we must limit our recognition of the suffrage as, in any exceptional manner, entitled to the character of an educational institution. In a manner closely analogous to that in which it belongs to the electoral or representative system, an educational character might be ascribed to every other institution of the social organism. The Legislature which enacts positive law, the court which administers it, the executive which enforces it in civil, and, above all, in criminal cases, like the laws which they enact and administer and enforce, are all of them "schoolmasters to bring us unto Christ."<sup>1</sup> The State, as a whole, like the life of man in its highest and widest conception, is a teaching institution,<sup>2</sup> and is thus the source of that positive law, of which it is likewise the fullest and most perfect expression. The apparent *petitio principii* of which we are guilty in thus viewing positive law, or the State which is its embodiment, as its own source, arises only when we lose sight of the distinction which we formerly made between jurisprudence as a special science, and jurisprudence as a branch of the science of life. Viewed as a special science, law does not teach, but only gives freedom to learn. It is thus only mediately, through its participation in the wider objects of life as a whole, that positive law contributes to its own formation, and, as we have likewise seen, to its own

<sup>1</sup> Gal. iii. 24.

<sup>2</sup> That God's dealings with man, not in time only, but in eternity, are wholly educational, was a favourite thought with the late Mr Erskine of Linlathen, and he has worked it out in many directions in the profound and eloquent papers which he has left behind him.—"The Spiritual Order, and other papers, selected from the MS. of the late Thomas Erskine of Linlathen."

gradual and approximate, though not in this world, probably, to its ultimate annihilation.<sup>1</sup>

II. *The means by which the community develops its rational will.*

(a) *Conscious effort on the part of individuals and classes.*—Under this head a question deeply affecting the duties both of individuals and of classes forces itself on our consideration. In quiet and uneventful times we are much in the habit of consoling ourselves for the lack of individuals of unusual insight or strength of character, and possibly of justifying our own inactivity, by the notion that though government may still demand some sort of conscious and organized superintendence, progress, for the future, may be intrusted to a certain divine, though blind, instinct which inspires the masses. Our doctrines of social evolution and development fail to take cognizance of the fact that society is only a congeries of individuals, and accepting the theory that “the individual withers, and the world is more and more,” not statesmen and politicians only, but the educated classes, as a whole, have recently exhibited a tendency to abdicate their traditional leadership, and to make a merit of “drifting,” as it is called, or indolently floating on the current which they had formerly striven to direct. Sensible that the impious denial of the universality of reason must be abandoned—recognizing the fact that the rule of an exclusive oligarchy was unjust and is for the future impossible, and dazzled by the attraction of extreme opinions now in the direction of democracy and now of imperialism,—they have seen no resting-place between the untenable position which

<sup>1</sup> *Ante*, Book II. cap. i.

they quitted, and a fatalistic acceptance of the dictation, and, as a practical consequence, of the dictatorship, of the numerical majority, or of its leaders for the time being. *Vox populi vox Dei* has been accepted, not as a recognition of the fundamental rectitude of mankind, or of the presence of rational will in a particular community, but of the infallibility of the portion of mankind, or of the community, which has always been, and must always continue to be, the most fallible. It is the same error which I pointed out,<sup>1</sup> in another connection, as having been committed by those anthropologists who seek to derive their knowledge of humanity from a study of the imperfectly organized, the partially developed, or the lapsed races of mankind, with this difference—that the proposal here is to ascertain the opinions of those most likely to be mistaken, not with a view to their possible rectification, or even to the gratification of our curiosity, but in order that we may adopt them for the guidance of our conduct and of theirs.

But this theory, some may perhaps still be tempted to allege, is involved in the doctrine, that though man be fallible, and race sink before race, mankind, as a whole, is divinely guided to the goal of existence, and the final object of creation is secure. For this reason it seems necessary that I should analyze it with what, to some, may appear superfluous care.

The theoretical answer to the belief in the loudest cry of the hour as the true expression of the rational will of a people, or rather the theoretical means of sifting the truth from the error which that belief contains, is not far to seek.

<sup>1</sup> *Ante*, Book I. cap. iv.

It is furnished by a fact on which I have already dwelt sufficiently — viz., that though God has endowed all men alike with reason, He has not endowed them all with like reason; and that, as duties and gifts are reciprocal, He cannot have intended to absolve the recipients of His greater bounty from corresponding responsibilities. The promise of divine guidance, which the instincts of our nature afford us, is not a promise of guidance without human means; and the human means which God has appointed for this end are—leadership proportioned to power and reason, and obedience proportioned to immaturity, imbecility, mediocrity, and irrationality.<sup>1</sup> Effort and self-restraint must go hand in hand, and it is hard to say whether the failure of the one or the other be most fatal to progress.

Neglect of the means, it is true, will not arrest the laws of nature, or prevent the attainment of general or final ends. Winds will blow, and tides will run; ships, as a rule, will reach their ports, and mankind will “rejoice on the shore.” But individual ships will perish, and individual men and nations will weep; and this equally whether their officers neglect to issue the requisite orders, or their crews refuse to obey them. No providential guidance of wind or tide, no blind inspiration of the crew, will supply the place of honest conscious effort, or loyal obedience, as his duty may be, on the part of any single member of the crew. But the consequences of negligence will not be equal, either in all or to all. On the contrary, it will increase and diminish in exact

<sup>1</sup> “The fountain-head of all life, and the only possible human cause of any development, is conscious personality.”—Bunsen’s *God in History*, vol. i. p. 50.



proportion to the importance or insignificance of the individual, from the captain to the cabin-boy. Power and reason will be the measure of responsibility—a measure which will certainly be applied to it here or hereafter.

The *de facto* principle, properly understood, is thus our answer to the fatalism which has been ignorantly urged against it; and this just as much whether fatalism springs from democratic or despotic roots. The exclusive rule of the many gains no more by it than the exclusive rule of the few; but it surrounds the proportional rule of all with the halo of divine authority.

Such, then, I take to be the theoretical response which it behoves us to return to the claim of the body politic to march, like St Denis, with its head in its teeth. Let us now see to what extent experience warrants the experiment. Thucydides said of the Athenian state, in the days of Pericles, that, though nominally a democracy, it was in reality a government administered by the first man. I believe he would have uttered no paradox, had he said that on this account alone did it enjoy its short and precarious existence as a democracy, even in name. But though the appearance of such a leader as Pericles does not often occur, and even such an approach to democracy as Thucydides commemorates has rarely been recorded by historians, there never has been a generation of civilized men, particularly if it was at all a progressive generation, to which a body of persons, few in comparison with the whole community, did not fill the place which Pericles did to the Athenians at the commencement of the Peloponnesian war. If any particular period of history

be mentioned, we can, for the most part, tell the names and count the numbers of those who, in any individual state, directed the current of thought and action. True it is that to those of whom history takes note there would fall to be added, in order to sum up the leaders of a whole generation, a still greater number of persons—women, for example, and mothers more especially—whose activity was not less precious, but who, partly from accident and partly from choice, have been covered by a privacy which history endeavours to penetrate in vain. As civilization advances and knowledge is disseminated, the influence of this silent class increases. It is its increase amongst ourselves which renders it increasingly difficult to calculate the results of a general election. But this silent class too has its silent leaders, more numerous it may be than those who in the general community come ostensibly to the front. Still, if both classes were reckoned together, the tale would be inconsiderable,<sup>1</sup> not only as compared with the whole community, but with those who hold public offices, or who sit in the Legislature. The number of names in Smith's *Dictionary of Biography* probably does not exceed the number of officials in the Roman Empire at any one time from the age of Augustus to that of Constantine, and certainly does not equal the number of inhabitants of a very moderately-sized city; and yet it contains the name of every person who is known to have influenced thought and opinion in the ancient world, together with the names of many who certainly did not. If the latter be put against the great names that have perished, perhaps the whole

<sup>1</sup> Coleridge's *Statesman's Manual*, pp. 214, 215, Pickering's ed.

number of names which it contains may pretty nearly correspond to the whole number of really influential men and women who lived during the whole period of history which the work embraces.<sup>1</sup> These remarks may seem to conflict with Mr Herbert Spencer's strictures on what he calls "the great man theory" of history, and to a limited extent they certainly do so, for these strictures seem to me to involve a palpable fallacy. He enumerates the great men of history, and he asks, "Could they have done the works they performed apart from the social and intellectual conditions in which they lived? Could Shakespeare have written his dramas, or Watt invented the steam-engine?" I reply, Most certainly not. But the men might have been equally exceptional, and have

<sup>1</sup> One of my pupils did me the favour to test this assertion by counting and classifying the names in the *Dictionary of Biography and Mythology*, and also in that of *Geography*, including the whole period from Homer to Justinian. He tells me that they contain:—

1st, Persons of little importance, who are mentioned simply from their connection with some event, or from allusions to them by classical writers, . . . . .	2005
2d, Persons of whom a brief sketch is given—	
Males, . . . . .	1322
Females, . . . . .	118
3d, Persons of whom an account is given, varying in length from $\frac{1}{4}$ page to 3 pages. This class includes all the names that a person having received an ordinary classical education could be expected to know—	
Males, . . . . .	326
Females, . . . . .	16
Total, . . . . .	3787

If the 2005, comprising the first of these classes, be taken to represent the forgotten names of those whom I have called "silent leaders," the total, 3787, may perhaps give an approximation to the number of persons who exercised exceptional influence over their fellow-men during this long period of history.

done works, relatively to their surroundings and opportunities and the requirements of their age, equally remarkable. His observations are true and valuable to the extent of showing that we cannot understand the course of history by studying individual characters apart from their surroundings, but not to the extent of showing that these surroundings were not influenced by the conscious efforts of the few far more than by the unconscious tendencies of the many.

But granted, it will be said, that the few have led the many in times past, does that fact afford any proof either that they will continue to lead them, or that they have led them forward? I answer that it affords a good deal of proof both ways, because, first, there is always much reason to believe that what has continued long, and been often repeated, depends on laws which are permanent; and, second, permanent laws, being God's laws, the result of their action, by whatever means, will be progress ultimately and on the whole.

But there is another consideration than that of the number of actors by which we may perhaps come nearer to a solution of this question. Though the history of the world presents to us the phenomenon of a flowing tide, it is a tide in which the receding alternates with the advancing wave. Let us take such of the advancing waves as are historically known to us, and try whether we can so analyze them as to discover whether the influences which moved them onwards have been supplied by conscious individual effort, or by unconscious general impulses.

The greatest of all onward movements, and the most popular in the sense of being that by which the people were the

greatest gainers, surely was Christianity. Did Christianity, then, spring up as a spontaneous popular growth, or was it laboriously sown and watered with the blood and tears of a single Founder? We are often told that great men are mere exponents of a spirit which is struggling for utterance, that they light a train which is laid. But such expressions are in general only acknowledgments of our ignorance of how the spirit was infused, or the train was laid. In the case of this greatest of all men, and of all popular leaders, we know, at all events, that He struck no chord that was ready strung. On the contrary, the many of all ranks "rejected and despised" Him; and after His marvellous work was ended and His teaching was complete, His whole adherents assembled "in an upper room."

But the origin of Christianity, it may be urged, was miraculous, and affords no analogy by which we may judge of the action of human causes. That the character of its Founder can be measured by no human standard I fully admit, though I believe that much of the benefit of Christianity is lost by His activity being treated as an exception to, in place of an ideal instance of, the general action of Divine grace. But I am quite willing to peril this argument on what are usually regarded as natural occurrences. By Protestants, to whom I mainly address myself, the Reformation, notwithstanding the inconveniences attending it, to which I have already referred,<sup>1</sup> will be admitted to have been the most unequivocal step in advance that mankind has made since the spread of Christianity. Now, whatever phase or period of the Reformation

<sup>1</sup> Pp. 173, 273.



we select, in whatever country we study it, I think we shall find that it was traceable to individuals. In England, in the fourteenth century, it received its first impulse from Wickliffe and Chaucer, and it was favoured by the King and John of Gaunt. In their own way, possibly, Occam and Greathead (Gros-tête) did even more. In many places, no doubt, "the common people heard it gladly;" but it was preached to them by a few who were not only specially gifted, but had been specially instructed. It was not for a couple of centuries later that it fully took hold of the masses, and even then by no means spontaneously. In Bohemia, it was Wickliffe's writings and example that inspired, not the masses, but John Huss and Jerome of Prague, both of whom were university men. With them the movement was born, and with them, substantially, it died. In the sixteenth and seventeenth centuries the Reformation became a popular movement, if ever there was one; but it did not even then begin with the people. Its cradle was the University of Wittenberg; and, in so far as it was an advance in thought, it scarcely made the slightest progress after it passed out of the hands of the learned class. In Germany, in Switzerland, in Scotland, it remained stationary at the points at which Luther and Calvin and Knox left it, or it went back. Even Melville's teaching was narrow and retrograde compared with Knox's; and during the periods when, and in the directions in which, it passed into popular hands, it strikingly degenerated. German Anabaptists, English Puritans, and even Scottish Covenanters, though more than justified in what they did by the illiberality of their opponents, did nothing but exaggerate the errors to which Protestantism

was prone, and occasion those schisms, dissents, and disruptions by which both religious and civil life have been rent asunder. It is the popular conception of Christianity which grew up amongst the ignorant at this particular period of our history which, more than anything else, feeds the infidelity of the present time. Even Mr Mill's scepticism is distinctly traceable to it, and was indeed the logical result which his father had already worked out of it.

Again, take the political reformation, the movement in favour of universal liberty. Like the religious reformation, it began in this country in the fourteenth century, and sprang from the very same roots—it was the secular side of Wickliffe's teaching,—and Wickliffe, and Chaucer, and John of Gaunt, and Piers Ploughman or Plowman (who was no ploughman at all) were its first apostles. In the earlier transaction at Runymede, it is true, no single name is very conspicuous. More than almost any other historical event, it possessed the character of common action; but then it was the action of the few, not of the many, and it stands out as a conspicuous example of a gift of liberty by an oligarchy to a whole people. It was otherwise with the next great step in the development of our political liberties. The more closely the reign of Henry III. has been studied in recent years, the more has it appeared that the representation of the commons is traceable to the personal insight and activity of Simon de Montfort.<sup>1</sup>

But Jack Cade's insurrection, you will say, centres in his name, as unmistakably as the rising in Henry III.'s day does in that of Simon de Montfort; and if the latter be

<sup>1</sup> Pauli, *Geschichte von England*, vol. iii. p. 488 *et seq.*

called the father of the commons, the former with equal reason may be called the father of communism, unless, indeed, his distinguished predecessor, Wat Tyler, have a better claim to it.<sup>1</sup> I am far from desiring to rob either of them of that honour. Mobs have their leaders as well as armies; error has its apostles as well as truth; weeds may be sown as well as grain; the demagogue and the fanatic are individuals, as well as the sage and the saint. What I maintain is that weeds will sow themselves, but grain will not—at least not to any useful purpose; and that in like manner, though error may be planted and cultivated, and retrogression may thus be precipitated by individual effort, it is not dependent on it, whereas truth and progress without it are impossible.

Of this we find a conspicuous example in that remarkable movement which has so deeply affected the life of our own time, and which may in some respects be traced to the free institutions of our own country, and the liberal aspirations of our race—I mean “the Revolution.”

Towards the end of last century this movement was ushered in and welcomed by a galaxy of talent and of virtue as great as is to be found in most periods of history. Washington and Lafayette and Necker do not perhaps rank very high

<sup>1</sup> The best claim of all is probably that of John Ball, the vagabond priest, whom the people took out of the archbishop's prison, and put forward as their spokesman in Wat Tyler's insurrection, in 1381. From his sermon, as sketched by Dr Pauli, it would seem that he laid claim, on behalf of his constituents, to absolute equality—*Freiheit und Gleichheit*—in the sense of 1789. His cry was *Æqua libertas, eadem nobilitas, par dignitas, similisque potestas*—

Whan Adam delfte and Eve span,

Who was then a gentleman?

—Pauli, *ut sup.*, iv. 527.

amongst the intellectual heroes of humanity, but their characters were an entire guarantee for the purity of their intentions; and when we remember the circumstances in which they acted, and recall the doctrines which they desired to teach, we have no difficulty in accounting for the indiscriminating sympathy which they experienced even from men like Edmund Burke and Immanuel Kant. In America, down to the presidency of Jefferson, and in France, till the meeting of the National Assembly, the Revolution is chargeable with no serious error. Its doctrines, as understood and acted on by its promoters, amount to nothing more than a recognition of truths which we ourselves have found to rest firmly on the basis of nature, and which, in this country, had been recognized more than a century before by the Revolution of 1688. But these doctrines, unhappily, even in the state documents which were issued, were not stated with such perspicacity<sup>1</sup> as to guard them against the errors which the writings of Rousseau and others had sown in the public mind; and no sooner did the Revolution pass out of the hands of its originators, and become a merely popular movement, than this very remarkable phenomenon was exhibited. The truth was received with comparative indifference, and has often since been entirely lost sight of; the error was hailed with shrieks of enthusiasm, and clung to with fanatical devotion. The reason, of course, was that the error appealed to the superficial and immediate, the truth to the deeper and fundamental instincts of humanity. Liberty really meant *la carrière ouverte aux talents*, "the tools to him that can handle them," and

<sup>1</sup> *Ante*, p. 392.

so it was preached at first. But what was that in comparison with the glad tidings that came afterwards, that men for the future were to handle no tools at all? Equality again was equality before the law. But that was no very dazzling boon; for, though the law might give no heed to who a man was, it was much to be apprehended that it might take cognizance of what he did, and failed to do. Equality before the tax-gatherer was another phase of equality before the law; but that the tax-gatherer should knock at all doors alike, was a mere mockery to him who had got hold of the higher doctrine that he should knock at all doors but his. Even fraternity was a principle that cut both ways, and required to be defined in a liberal sense. But absolute equality—meaning thereby a levelling-down to the leveller's own level, and a fair division for the future, not of work but of wages—that was what was wanted. And such accordingly was the construction which the inspiration of the many, as expressed in the "Declaration of the Rights of Man," put on the equivocal words with which Washington and Adams, to the great regret of the latter,<sup>1</sup> had permitted Jefferson to head his "Declaration of Independence." It is now ninety-one years since the revolutionary doctrine received this popular exposition from nameless, or at least unmentionable individuals.<sup>2</sup> During that long period the Revolution has

<sup>1</sup> *Ante*, p. 392.

<sup>2</sup> The miserable fate which overtook most of these wretches is well known. The following, though I have it merely on newspaper authority, is probably a pretty accurate account of what is known of them: "No less than fifty-eight were guillotined, including Carrier (to be remembered for his Loire marriages), Couthon, Danton, Camille Desmoulins, Robespierre, St Just, Philippe Egalité,



had no single leader who rose above, and very few who reached, the average intelligence of an educated man. The learned class has kept aloof from it, and the consequence has been that, as a political doctrine, it has remained absolutely stationary. Like the dynasty which it superseded, it can neither learn nor forget. In 1880 it is still muttering the shibboleths of 1789, and Russia is threatened with the experiences of France. The only approach to a new idea which has come out of it, even indirectly, is the idea of Cæsarism, by which it has twice been overthrown; and in striking confirmation of my thesis, that idea did not originate

&c. Two were shot. Eight were assassinated—Andrein, Constitutional bishop and representative of Morbihan; Marat, stabbed in his bath by Charlotte Corday, &c. Fourteen committed suicide, including Ruhl, who broke the bottle of sacred oil at Rheims, and Romme, who drew up the republican calendar, with its Thermidor, Fructidor, its sans-culottides, its decades, &c. Five died of grief, and one of liquor. Four ended their days in a madhouse; and six, including the Marquis de Fonvielle, perished in abject misery. Three more were found dead, the bodies of two half devoured by dogs. Two died more nobly in the ranks of the army—Gilet, who fell whilst serving under Jourdan; and Albite, frozen to death during the retreat from Moscow. The ex-deputy of the Sarthe was carried off by the Prussians in 1815, and died at Berlin. The curé Bassah, who represented the Seine-et-Oise Department, died in prison when about to be tried before a court-martial at Milan for robbery. One deputy perished from joy; his name was the same as that of the deputy who fell on the barricades in Paris on the 2d December—Baudin. What sudden and fatal delight he experienced is not chronicled. The member of the Gironde, Jai-de-Sainte-Croix, was burned in effigy at Philadelphia for having signed a treaty of commerce with Lord Granville, between England and America. It is probable that, only burned in proxy, Citizen Jai-de-Sainte-Croix died a natural death. Three other deputies died suddenly. One hundred and thirty-eight were transported or exiled, and most of these died abroad. Sixty-five disappeared, and left no trace behind them except their crimes. Such was the ultimate fate of the members of the National Convention.” I cannot regard it as a good omen for France that the walls of the Salon should still be annually crowded with pictures representing them and their deeds.

with the people, but was the old idea of the latter Empire, revived by two very remarkable individuals whom the insupportable anarchy under which the nation groaned, or with which it was continually threatened, called into activity.

I shall mention but one other instance of a progressive, and with us now happily a popular doctrine, the origin of which was not popular—the doctrine of Free Trade. The honour of its discovery and scientific enunciation, as a legitimate inference from the facts of nature, belongs prominently to the occupant of a university chair in this country, and exclusively to the learned class. Even its popular triumph in England was effected mainly by the personal efforts of two individuals of unusual energy and oratorical power. In France its partial adoption was due to one whom “the Revolution” cannot mention without execration; and “the Revolution” has always opposed it. In America it is opposed by the extreme representatives of popular opinion. The only novel and fruitful application of the principle of fraternity, has thus been everywhere condemned by the most boisterous advocates of that principle. Even in the cases in which proposals to revive protection under the guise of reciprocity, or otherwise, have proceeded from professedly Conservative sources, their object has invariably been to catch the democratic vote for despotic purposes.

Greater than even the impetus of free trade has been that which material progress has derived from mechanical invention, and no one, I fancy, will question that invention is the work of individual effort. We did not “drift” into a knowledge of the uses of steam or electricity.

But I must not multiply instances, or dwell longer on a theme which manifestly admits of indefinite expansion. Enough, I hope, has been said to convince my readers, that whilst experience and reason concur in assuring us that the voice of man is the voice of his Maker, and thus, in one sense, *vox populi vox Dei* is the deepest as it is the oldest of all political truths, there is another sense, and a far commoner one, in which, as rational politicians and scientific jurists, we are bound to dismiss it as the shallowest and most pernicious of errors.

“*Vox populi vox Dei*,” do they say ?

Alas, quite otherwise !—and he who first  
Mouthed the crude sophism sowed a seed accurst,  
To choke the growth of Truth, and bar man’s way  
To Freedom with rank jungle—fruitful but  
Of rottenness. All history proves this true :  
God speaks not by the Many, but the Few.  
And in all ages,—since “The People” shut  
With the blank seal of death the inspired lips  
Of Socrates,—since that yet darker hour  
When blood-stained Calvary owned their “sovereign power,”  
And nature groaned in earthquake and eclipse—  
Has that fierce Voice, at some loud babblers’ nod,  
Been lifted in blind rage against the voice of God.<sup>1</sup>

(b) *Social Organization.*

In studying the objects of natural law, we have seen<sup>2</sup> that order, though not indeed the object in itself, is the means, *sine quâ non*, to the attainment of that object, which is liberty. We now encounter a special illustration of this general relation in the fact that the development of the rational will, in virtue of which a community is autonomous, is dependent on, and proportioned to, the perfection of its organization. In the last section I endeavoured to show that the formation and

<sup>1</sup> *Spindrift*, by Sir J. Noel Paton.

<sup>2</sup> *Ante*, p. 367.

development of the rational will is the work of conscious effort, and not a spontaneous growth of unconscious and self-directing influences. It is obvious, then, that, like other works, this work will have the best chance of being performed well when it is portioned out to the special labourers, or classes of labourers, who can best perform it, according to their respective capabilities, and not when, capable and incapable alike, they all set about it indiscriminately without order or method. Now, with rare exceptions, of which I shall speak presently, such portioning out is effected spontaneously by the natural division of society into what are called classes or orders, which, for purposes of social and political work, exactly correspond to its division into professions and handicrafts for the performance of its other functions. If castes, by which men are deprived of each other's aid, be an impediment to progress, classes, by means of which they are enabled to avail themselves of each other's qualities, and supply each other's defects, are in both respects precisely the reverse; and the cry for the abolition of class distinctions must be numbered with the other hallucinations of false liberalism—

“Take but degree away, untune that string,  
And, hark, what discord follows!”<sup>1</sup>

The class to which a man belongs is merely the more immediate sphere in which he is called to work, for the time being. So far from its being requisite that he should remain stationary in one class, the very highest test of the usefulness

<sup>1</sup> *Troilus and Cressida*, Act i. scene iii. In Mr Herbert Spencer's *Study of Sociology* (p. 60) some interesting illustrations will be found of the action of the law of “Differentiation.”

of a citizen, just as of a soldier, will often consist in his having passed successively upwards, through every class from the lowest to the highest ; whilst, conversely, his progress downwards will be the surest sign of uselessness. But at each stage of his progress, in the one direction as in the other, his value will in no small measure be proportioned to the completeness with which he enjoys the privileges and shares the responsibilities of the class to which he belongs, for the time being. The best colonel will be he who was the best captain, in his day. The only natural limit to social promotion, either in extent or rapidity, consists in the inability of any but the *elite* of mankind adequately to perform the duties of any class except that in which they were born, or for which they have been educated, or to perform them without long practice. Each step, whether upwards or downwards, demands a new education, a process both of learning and unlearning, of which few men are capable ; and unless this new education be complete, or at least as complete as the former one, it is obvious that both the community and the individual will be losers by the change. The point of transition is always a period of peculiar danger. The notion prevalent in free countries that every man who is born below the highest level ought to rise, is thus an error ; though it is not nearly so fatal an error as the notion prevalent in democratic countries that every man who is above the average level ought to fall. To the "levelling down" process, in addition to the consideration that it is a retrograde step on the part of the society which performs it, by means of which it loses ground both absolutely and relatively to surrounding nations, there is this farther objection as



regards the individual, that men adapt themselves far better to the duties of the class above them than to those of the class below them. Even where the descent can be ascribed neither to the fault of the individual nor to the injustice of others, it is always a misfortune over which few men can triumph.

(c) *By the selection, and setting apart, of exceptional workmen for exceptional work.*

Though the classification of society which naturally results from the unequal distribution of individual gifts, if not artificially interfered with, will effect such an amount of division of labour as to supply the conditions of orderly, and as such, to a certain extent, progressive existence, it does not exhaust the means of organization which every society has at its disposal. More or less every man has his speciality, in the sense of a kind of work for which he is more suited than for any other. But the difference between normal and exceptional men, in addition to a difference of power, lies also in this, that the specialities of the normal man belong to many, whereas the specialities of the exceptional man belong to few. It is obvious, then, that the community, whilst it suffers but slightly from the mal-selection or neglect of labour in the one case, will suffer very seriously from the same causes in the other; and hence the necessity for its active interference to secure its extraordinary resources. It is true that men who have strongly marked specialities will, in general, not only manifest them, but insist on following them; and thus their selection may be said to be spontaneous. But men often deceive themselves, and it is therefore not surprising that they should deceive others, particularly with reference to subjects

which, *ex hypothesi*, can be familiar to few. Hence the necessity for the community adopting every available test of capacity before appointing individuals to the discharge of its less usual duties. The necessity, when such men are selected, of setting them apart and purchasing their services, for the most part for life, arises from two facts: 1st, that the work which we require of them usually demands long-continued training as well as special gifts; and 2d, that we cannot trust to their being maintained by the direct and immediate sympathy of the community. The mercantile press, we have seen, can render them no aid; and it is impossible that they can be popular teachers of what must, necessarily, be unpopular subjects.

*The Professoriate.*—The institution by means of which exceptional work of this kind has usually been secured is the University, viewed not as a means of disseminating, but of advancing knowledge; and the office by which this is effected is the Professoriate.

It is impossible to imagine any error more fatal to the life of the State, and, as such, more discreditable to a statesman, than the error of regarding the University as a mere teaching institution—except, indeed, the error of regarding it as a mere examining board, and making no provision for the acquisition of the knowledge which it is to measure. The life of the community, like the life of the individual—nay, like life itself—exhibits but the two phenomena of progress and retrogression. Stationary existence is the antithesis of existence altogether, as we know it. A state, then, which, whilst disseminating and testing, makes no provision for advancing knowledge, accepts

—not permanence, not even continuous prosperity—but retrogression ; the loss first of spiritual and then of physical life, for the spirit is the salt that keeps the body from rotting. Now the University is the State in the attitude of a seeker after truth, of an aspirant to new and higher life, of a claimant for more reason and more power ; and the organ in virtue of which the University seeks to gratify these aspirations of the State, as I have said, is the Professoriate.

The theological faculty of the University, acting by means of the professoriate as an organ of scientific investigation, stands to the Church precisely in the same relation in which the legal faculty, and indeed all the secular departments of the University stand to the State. It is the organ by which the Church seeks the truth. The recognition of dogma, which we have indicated as inseparable from the Church as a teaching institution, here becomes altogether out of place. The function of an academical faculty of theology,<sup>1</sup> like that of all the other academical faculties, when seen on their scientific side, is simply to discover *the truth* ; and thus the faculty of theology differs from the other faculties, not in its object, but in the means which it employs.

Of the dependence of the life both of Church and State on the vigour and activity of a scientific professoriate, the existing condition of the two leading nations of continental Europe furnishes striking examples.

During the last half-century, the progress, both absolute and relative, of the States of North Germany has been pro-

<sup>1</sup> As to the function of an academical faculty of theology, see Preface to Kant's *Theory of Religion*, pp. 7, 8 ; Semple's trans.

digious. First their intellectual and then their material supremacy has been reluctantly acknowledged; and the centre of power has been shifted from Paris to Berlin. And simultaneously with this accession of life, the activity and vigour of the German professoriate has been beyond all parallel, not only in any other country, but in any other period of history. In Italy, in Switzerland, and even in Spain, it has rendered, and I believe is rendering, important services to progress; and the same, I hope, may be said of Scotland. But in no country in the world was such an army ever equipped and sent forth for the simple conquest of truth as in modern Germany, and in no country have such victories ever been gained over error, or has knowledge been so speedily converted into power. In France, on the other hand, after the ancient Universities had been swept into the vortex of centralization, and the State had become a vast examining board, the Faculties, once the nurseries of science, degenerated into mere cramming schools, and the scientific professoriate ceased to exist,—the very name of the office becoming synonymous with schoolmaster. The new system has been in operation for sixty-eight years,—a longer period of probation than has been accorded to any other institution of modern France. And now we find that it is to its degrading and enervating influences that the most clear-sighted of French politicians unite in ascribing the moral, intellectual, and, ultimately, the material decadence of their country. “The success of Germany,” cries Claire Deville, “is due to the liberal organization of the German Universities. *It is science that has vanquished us.*”

In farther illustration of this very important subject I shall

quote two or three sentences from a lecture "On Teaching Universities and Examining Boards," delivered in 1872 by Dr Lyon Playfair—himself a high authority—to the Philosophical Institution of Edinburgh.

"Recent events," he says,<sup>1</sup> "have strengthened the conviction which De Tocqueville expressed twenty years ago, that there is a continually increasing poverty of eminent men in France. I will cite the evidence only of men of the highest eminence, members of the Institute, or professors in the University itself. Their opinions may be taken as answers to the question which forms the title of Pasteur's pamphlet: 'Pourquoi la France n'a pas trouvé d'hommes supérieurs au moment du péril?' That is a grave question for France, and its best sons are trying to answer it; but it is melancholy to see the assaults that they are obliged to make on a University which, in its days of independence, used to be hailed as the 'fountain of knowledge,' the 'tree of life,' and the 'candlestick of the Lord'—terms which were accorded by the enthusiastic admiration of all countries. First, let Pasteur, whose eminence I need not advert to in an academic assembly, answer for himself. 'While Germany was multiplying its Universities, and establishing among them a most salutary emulation; while it was surrounding their masters and doctors with honour and consideration; while it was creating vast laboratories furnished with the best instruments, France, enervated by revolutions, always occupied with sterile aims at a better form of government, gave only a heedless attention to its establishments of higher education. The unanimity is sur-

<sup>1</sup> P. 8 *et seq.*



prising with which eminent men ascribe the intellectual paralysis of the nation to the centralization of administration and examination by the University of France.”<sup>1</sup> Dr Playfair then cites the passage from Claire Deville quoted above, and thus proceeds: “Dumas, one of those eminent men in France, formerly a minister, and for years actively engaged as one of the eight inspectors of superior instruction in the University, gives his testimony as follows: ‘If the causes of our marasmus appear complex and manifold, they are still reducible to one principle—administrative centralization—which, applied to the University, has enervated superior instruction.’ He proceeds to show that municipalities and provinces lose all interest in their colleges and schools when these are deprived of their powers of self-government; and when their instruction and their examinations are regulated from the centre; and he contrasts the French system with that of other countries.”

“Dumas then indicates what is necessary for the restoration of France to her position among nations—‘Restore to our Universities under the surveillance of the State, when connected with State grants, the independence which they enjoyed before the Revolution. The great men of those times are glorious historical witnesses of the vigour of the studies and of the discipline effected by the liberty of education enjoyed by our fathers. . . . I plead for the autonomy and liberty of our Universities.’ Quatrefages, General Morin, and others,

<sup>1</sup> Mr Gladstone is said to have originated the proposal for an inquiry as to the expediency of founding a new “National University for Scotland” (21 & 22 Vict. c. 83, sec. 15, § 10); but the Commissioners reported against such a measure, and Mr Gladstone is believed to have since expressed himself in favour of the maintenance of the existing Universities.

express themselves in nearly similar terms. Lorain, Professor in the Faculty of Medicine, gives testimony, if possible, still more emphatic. . . . He tells us that a central university professing to direct everything, really directs nothing, but trammels all efforts in the provinces. 'Originality in the provinces is destroyed by this unity.'"

"After quoting the opinions of the Commissioners of 1870, as to the want of unity of degrees in France notwithstanding the unity of examination, he sums up the demands of reformers in the following words: 'What we demand is not new; it is simply the return to the ancient system—to the tradition of the ancient Universities. We demand the destruction of the University of France, and the creation of separate Universities. That is our programme.'"

"I have hitherto quoted the opinions of men of science, but I might add to them those of a long list of politicians and men of literature, from Talleyrand, Turgot, De Tocqueville, Prévost-Paradol, down to the present day; but to economize time I must content myself with two more quotations. In a letter to myself, Michel Chevalier, after stating that the liberalization of the University frequently engaged the attention of the Senate during the last Empire, sums up his opinion of the necessary reforms as follows: 'Much more of autonomy in our Faculties than they have at present, even for those which are supported by the State; a large vote for their maintenance in the budget; liberty for individuals and associations to found rival faculties; reservation to the State under equitable guarantees of the right of granting degrees, as long as there are degrees.' And, finally, to quote a dis-

tinguished clerical opinion (I give the words of Rénan): ‘The system of examinations and competitions, on the great scale, is illustrated in China, where it has produced a general and incurable senility. In France we have already gone far in the same direction, and that is not one of the least causes of our abasement. The paltry Faculties created by the first Empire in no way replace the great and beautiful system of rival Universities, with their separate autonomies—a system which all Europe borrowed from France, and which all countries but France have preserved. We must create in the provinces five or six Universities, each independent of the other.’” Would that, in the moments of tranquillity which they at present enjoy, Frenchmen would remember the cries for intellectual guidance which they thus uttered in their agony, only eight years ago!

One of the greatest political evils resulting from the absence of a secular learned class in France, has been that the priest and the demagogue have come face to face, and that popular reason has by no means been advanced by their altercations. “Hitherto,” says M. Rénan, “France has known but two poles—Catholicism and democracy. Oscillating unceasingly between the one and the other, she is never at rest. In order to do penance for her demagogic excesses, France abandons herself to the narrowest Catholicism; and in order to react against her narrow Catholicism, she throws herself into the arms of a false democracy. She ought to do penance for both of them at once.”<sup>1</sup>

The dispassionate character engendered by a life of con-

<sup>1</sup> *La Réforme*, p. 107.

templation is peculiarly favourable for the observation and appreciation of social phenomena, and the discovery of the natural laws by which the State is ultimately governed. The professor may thus be actively helpful to the practical politician in determining the objects which legislation must have in view. But the experience of Germany reminds us that the political action of the learned class, as such, must be indirect. Direct legislation does not belong to those who, as a rule, dwell much apart; and hence the failure of the "Frankfort Parliament of Professors," in 1848. Its members were not sufficiently acquainted with the concrete elements in the problems presented to them.

The external requirements of an efficient professoriate, in so far as the community can secure them, seem to be these—

(a) Careful selection of its members. This raises, at once, the difficult and as yet unsolved question of the best form of patronage—the only clear point being that the selection cannot be by examination, the requisite qualities being of a kind that cannot be thus tested. Probably the "Testimonial" system, with all its objections, combined with the patronage either of the Crown, or of a jury in which impartiality is more important than knowledge, is all that can be made of it, as the professoriate exists in this country. To a certain extent the examination test might be used as a starting-point, were we to adopt the German system of a graduated professoriate, commencing with the *Privatdocent*, passing on to the extraordinary, and lastly, to the ordinary professor. And it is by the adoption of this system alone, as it seems to me, that we can hope ever to attain to the formation of a learned class.

What keeps learning down with us is the want of a career, upon which a man may enter in early life, with the reasonable hope of attaining to a comfortable position in middle age.<sup>1</sup> The ultimate stages in this career, however, cannot be tested by examination, for the simple reason that the examinee by that time is, *ex hypothesi*, a representative of scientific views beyond those with which the examiners could be credited.

(*b*) Leisure (σχαλῆ) combined with public teaching, to the extent of bringing and keeping its members in contact with the best minds of the rising generation.

(*c*) Such dignity and independence of position as to protect its members from impertinent intrusion or popular dictation.<sup>2</sup>

(*d*) Such publicity as to expose them to criticism.

(*e*) Such competence of external means as to free the electors from the necessity of choosing those who are otherwise provided for, and those who are chosen from the temptation of accepting other literary, scientific, or professional occupations merely for the sake of remuneration; to enable them to associate on easy terms with the representatives of their respective departments in other schools of learning, at home and abroad; and lastly, to diminish the temptation, always great, to seclude themselves from the general society of the places in which they reside.

(*f*) Such moderation of external means, and modesty of

<sup>1</sup> I often wish our munificent benefactors would keep this consideration in view. No facilities they can offer at the starting-post, in the shape of bursaries, scholarships, fellowships, and the like, will tempt "canny" Scotchmen to run a race that promises nothing at the goal but starvation, or celibacy, or both.

<sup>2</sup> As a remarkable example of this evil may be mentioned the dependent relation in which the Professor of Political Economy in the University of Edinburgh stands to the Merchant Company.



position, as to take away the inducement, and free them from the duty, of taking a prominent part either in general society or in public life.

I venture on these remarks in the hope that the knowledge of the subject, which I cannot fail to possess, may counter-balance the prejudices which I very possibly entertain.

III. *The means by which the community ascertains its rational will.*

In this momentous problem of the science of positive law, it can scarcely be said that we have, as yet, got beyond the region of negative results. Our analysis of the rational will of the community, as the primary source of positive law, has shown us: 1st, That, inasmuch as that will resides, to a greater or less extent, in every sane member of a civilized community, it cannot be ascertained except by an appeal to them all. 2d, That, inasmuch as that will does not reside in each member of the community in an equal degree, it cannot be ascertained by an appeal to them all as equals.

The first of these propositions negatives the principle of exclusiveness, on which despotic and oligarchic theories of legislation are founded; the second negatives the principle of equality, on which democratic theories of legislation are founded. We have thus two danger-signals—beacons placed by nature herself on the opposing rocks between which our course must lie. But they afford little indication of the manner in which we must steer through the shifting currents of irrationality and passion by which so many individual states have been swept along to destruction, and civilization itself has so often seemed in danger. Mainly, of course, the problem belongs to

the objects of positive law, depends on circumstances of time and place, and does not admit of any permanent or general solution. But let us try whether, by looking into the phenomena which all society presents, we may not, from the side of nature, succeed in fixing, if not another lighthouse, at least another permanent buoy.

(a) *The amount of organization requisite for the ascertainment of the rational will is in an inverse ratio to the amount of direct personal contact with each other, on the part of the individuals whose rational will is to be ascertained.*

Where individuals are brought into direct personal contact, their qualities necessarily assert themselves. The stronger impose their laws on the weaker; and as strength and reason ultimately coincide, the wise and virtuous prevail over the foolish and the wicked. "A fair field and no favour" is all that Reason demands to make her voice heard, and continuous personal contact will supply that field. Now, in the family, in a profession, or in a community so small as to resemble these, such contact is inevitable; and the amount of rational will which they contain will, in general, be ascertained and vindicated without any organization beyond that which contact supplies. In the smaller of the Swiss cantons,<sup>1</sup> for example, the personal character and weight of every individual is known and felt by every other, and little artificial classification is requisite to give the community the benefit of the wisdom of its wisest.<sup>2</sup> The same, in no small measure, was the case in

<sup>1</sup> Even Algernon Sydney, Republican though he was, preferred Constitutional Monarchy in all except very small states.

<sup>2</sup> See a very interesting and able report on the political and industrial condition of Switzerland by Mr Gould.—*Further Reports from H. M.'s Diplomatic and*

the small states of Greece, and even in Rome in the earlier days of the Republic; though the legislators of antiquity wisely supplemented this advantage by a constitutional graduation of ranks. In colonies, during the earlier and ruder stages of their existence, the necessity for artificial classification is limited by additional considerations: 1st, The circumstances of the case being such as to render equality of condition and intelligence very much more of a reality than in old countries, there is less to classify, and the supremacy of reason will, consequently, be less endangered by the absence of classification; and, 2d, Families and individuals are there so widely separated as to render them in a great measure independent of each other—they can neither aid nor injure each other to the same extent,—and the miscarriage of communal reason, even should it occur, becomes a matter of comparative indifference. There is a vast difference between being separated from a “free and independent” neighbour by a couple of bricks and a range of mountains. In the latter case, the problem of ascertaining the rational will of the community has scarcely arisen, because the community itself has scarcely been formed. But as its formation progresses, the problem of the ascertainment of its rational will increases at once in importance and in complexity, and the law which I have enunciated comes into operation. The natural agents of direct personal contact and individual rivalry, by which its solution in small and simple communities is spontaneously effected, gradually disappear, and the necessity for artificial organization emerges.

*Consular Agents abroad, on the Condition of the Industrial Classes, &c., in Foreign Countries, 1871, p. 669.*

But is not the effect of progress the very reverse of what we have represented it? Does it not tend to equalize individuals—thus limiting the sphere of exceptional reason; and does it not promote rivalry—thus supplying the spontaneous means of its ascertainment? Both I know to be prevalent; but both, I think, are erroneous impressions.

As to the first, there is a single consideration, which, apart from all others, is, to my mind, decisive.

Almost every form of natural disparity may be summed up in the disparity of power which men exhibit of availing themselves of experience,—subjective and objective. It is out of this disparity, on a great scale, that the distinction between the historical and non-historical—the civilized and the uncivilized races of mankind—has arisen; it is to this disparity, on a smaller scale, that the distinction between educated and uneducated classes and individuals is traceable. Again, the difference between a cultivated and an uncultivated community consists mainly in the fact that the former, beyond the latter, offers to the individual the opportunity of developing this power by exercise, and availing himself of its consequences. Surely it is obvious, then, that the community which offers the greatest opportunities will carry the fortunate possessors of exceptional power *farthest* ahead of those to whom such exceptional power has been denied—in other words, that education, if carried beyond the merest elements of knowledge, will increase rather than diminish natural disparities and their consequences. Of the reality of this fact civilized states exhibit ample proofs within their own borders. Mental gifts certainly, and probably even physical gifts of nature, tell more amongst the educated than

the uneducated classes. The difference between the fortunes of a clever ploughman and a stupid ploughman is measured by two or three pounds of wages ; but the difference between a clever farmer and a stupid farmer is that between wealth and bankruptcy, and between a clever and a stupid barrister that between penury and a peerage. As occupations rise in difficulty, this principle makes itself more and more felt ; and the object of the examination system, the latest device of civilization, is to give it full play. In doing so, however, examinations, if successfully carried out, which they can be only in a very modified sense, would only anticipate the verdict of time, and prevent inevitable failure in after-life ; because success in most of the careers to which they are applied is impossible except to the able both in mind and body. Though the organs called into exercise are not the same, there can, I imagine, be no question that the continued strain through life, even on the physical power of a barrister,<sup>1</sup> is far greater than on those of a blacksmith. Literature is more trying work than even law, as is seen by the higher proportion of men who break down under it ; and politics, worthily pursued, probably is the hardest of all. Rousseau's assertion that civilization is the cause of inequality was one of the most egregious, and has been one of the most pestilent, of his errors. But that civilization brings out the consequences of inequality, as of every other fact of nature, I conceive to be quite unquestionable.

But civilization—progress—not only increases differences :

<sup>1</sup> The old age to which men live on the bench, and in other dignified social positions, is often remarked. It would not seem so remarkable if men would take into account the amount of bodily strength and health which is requisite to get there.



it causes separation, and limits contact. In a rude and primitive condition there is but one occupation—that, viz., of procuring the necessities of existence. In this occupation, consequently, all men must engage; all thus come into competition, and their recognition of each other's capabilities is immediate and spontaneous. But civilization confers leisure, and specializes labour; and in so doing it confines competition within narrower limits. Moreover, as occupations rise in difficulty and importance, those who discharge them diminish in number, and mark themselves off more sharply from the community at large. Of the truth of this statement we have a striking proof in the very small number of candidates for higher as compared with lower appointments. As the community advances, it thus loses, more and more, the spontaneous guidance of its most gifted and cultivated members. The "silent class," of which I have already spoken,<sup>1</sup> increases both in numbers and in importance. Their retirement into special and, to a certain extent, exclusive circles is no fault of theirs, or of the community from which they separate themselves. It is an inevitable, and, as such, a legitimate result; nay, as we have seen already, it is the condition of progress.<sup>2</sup> But its occurrence proves that, if such persons are to be called into general activity at all, it must be in relation, not to the community as a whole, but to the classes in which they have ranged themselves. It is in and through the class alone that the individual can be measured and utilized. "Individuals," as Savigny has said, "must be understood to constitute the State, not as such, but in their constitutional divisions." Even supposing excep-

<sup>1</sup> *Ante*, p. 480.

<sup>2</sup> *Ante*, p. 506.

tional individuals to quit the position which the natural organization of advanced society has assigned to them, and for political purposes to take their place in the ranks, the community would be thereby not only robbed of the special services which they would otherwise have rendered it, but misled in its calculation of the amount of reason which it contained. An army would form a very inaccurate conception of its force which counted its officers as common soldiers, and would give very great proof of its folly if it insisted on their acting as such. And yet that is precisely what advanced communities do, when, in endeavouring to ascertain the general will, they count all wills as equal, or in endeavouring to consult the general interest, they assign equal duties to all men.

(b) *For purposes of practical legislation it will, in general, be necessary that all citizens included in each political class or category be dealt with as contributing an equal amount of rational will.*

Inasmuch as no two human beings ever were wholly alike, ideal justice knows nothing of classification. "God sees each human being different from every other, and His thought and acting towards them are *righteous*, because He has respect to this difference."<sup>1</sup> The adoption of the principle of classification, then, is a confession of the necessary imperfection of all human government; for the equality which is thus declared for political purposes to exist between the individual members of each class, is by no means a perfect equality in point of fact. All that can be said for the justice that classification

<sup>1</sup> *The Spiritual Order*, &c., by T. Erskine of Linlathen, p. 235.

does, is that it is preferable to the injustice which it prevents. It is never, therefore, to be resorted to as good in itself, or maintained beyond the point of necessity. A well-governed family may be regarded as the model of a well-governed state; and the *prudens paterfamilias* does not classify his children, but, in direct imitation of the Heavenly Father, measures out to each his individual rights and responsibilities. That even he does more perfect justice by the latter method than the best government can ever hope to do by the former, is unquestionable.

But the method which is founded on the appreciation of individual merits, is applicable, in human hands, only to a very limited community. It could scarcely be applied to two families, and its inapplicability to the government of a school is notorious and confessed. As a rule, then, this method is applicable only where the governing power really knows, and can actually appreciate, every single member of the community which it governs. Now a state of any considerable size is not, and cannot be, thus omniscient within its own borders—a large community cannot measure itself with this degree of accuracy. The defence for the principle of classification, then, is not that a government founded upon it attains, but that it approximates to a recognition of the individual qualities of the governed more nearly than one that rejects it; for the latter form of government, however honest may be its intentions, is forced by its ignorance of individual qualities to treat all men as if they were alike, and thus violates their rights to a greater extent than a government which treats some men as if they were alike by classifying them in accord-

ance with characteristics by which, though they do not exhaust their differences, each class is really distinguished from the rest of the community.<sup>1</sup> Suppose, by way of illustration, that all students of law were classed together, and equal privileges and burdens were assigned to them, some degree of injustice would be done to many—perhaps to most of the individual students—for it would be only in rare and exceptional cases that the real importance of the individual would correspond exactly to that which was assigned to the class. But a smaller amount of injustice would be done to them than if their privileges had been declared to be the same with those of chimney-sweeps, and their fiscal liabilities the same as those of merchant princes, or leading seniors at the bar. If a cry could be raised for a poll-tax in place of an income-tax, the advantages of classification would soon become as apparent to those at the bottom, as they are now to those at the top, of the social ladder.

It may seem that, as the most perfect form of government, viewed as a mechanism for ascertaining the rational will, would admittedly be one which took cognizance of the qualities of individuals directly, we shall approximate more or less closely to such a government as we diminish the classes of which it professes to take cognizance in extent, and multiply them in number; for the nearest approach to dealing with

<sup>1</sup> It is scarcely possible to conceive more contradictory claims than those of the extreme Liberal party for entire individual independence on the one hand, and absolute individual equality on the other. If all men are to be independent individuals, and each to rest on his own merits solely, even class equality must be abandoned: if all are to be equal, there can be no individual independence at all, because all must be swept into one class.

the individual himself, is to deal with a very small number of individuals whose personal characteristics and external circumstances precisely, or very closely, resemble his. It is on this ground that Sir James Mackintosh has remarked, with great truth, that "of the two faults" of excess or defect of simplicity, "the excess of simplicity would certainly be the greatest; for laws more complex than are necessary would only produce embarrassment, whereas laws more simple than the affairs which they regulate would occasion a defect of justice."<sup>1</sup>

But there is a practical limit to perfectibility in this direction, for it is obvious that classification might very easily be so extended that we should lose the benefit of it altogether. A very extended and complicated classification comes to be no classification at all. The necessity for simplification, then, which led to the admission of the principle of classification at first, limits its application in this direction. How far it ought to be carried is a question which every community must determine for itself, and the true answer to which, even in the same community, will vary with circumstances. All that can be said abstractly will, I think, be embraced in the following proposition.

*(c) The classification which exists for economical and social purposes, for the time being, affords the measure of that which is requisite for legislative purposes.*

The truth of this proposition rests on the declaratory character which we have seen to belong to jurisprudence as a whole. To positive law the facts of society, for the time being, bear the same relation that the permanent facts of

<sup>1</sup> *Discourse*, p. 51.



nature bear to natural law. With reference to both, the object of legislation is to recognize and vindicate, not to overturn and reconstruct. And this is, above all, true of the electoral machinery, by means of which the community measures its rational will. Its function is to reflect the nation in the legislative mirror, not as wiser or foolisher, better or worse, than it is, but simply *as it is*; and this it can do only by recognizing the stage of complexity which it has really attained for the time being. To constitutional law, more especially, is that other saying of Sir James Mackintosh applicable: "Laws ought to be neither more simple nor more complex than the state of society which they govern, but ought exactly to correspond to it." <sup>1</sup>

(d) *The electoral system.*

The very difficult and important questions which, for every advanced community, must arise out of the adjustment of its electoral system, depending for their solution on the circumstances of each particular case, do not fall within the range of the present work. All that remains constant is the fact that, if the rational will of any community is to be measured with sufficient accuracy to enable it to be autonomous, and as such autarchous, this must be effected by taking cognizance of the differences of individual reason, natural and acquired—for in politics these correspond to the different measures of weight and capacity in arithmetic—and that this can be done only by means of constitutional arrangements which will grow in complexity as the society advances in civilization. In the absence of such constitutional safeguards, there will always

<sup>1</sup> *Ut sup.*, p. 415.

be danger of the indirect action of social forces, not necessarily under the guidance of reason—mere wealth on the one hand, or mere numbers on the other. The devotees of pleasure and the slaves of fashion at the top of the social ladder are as shallow and as liable to be imposed on as the victims of ignorance and penury at the bottom of it; and the history of advanced communities could furnish many examples of impostors who have not hesitated to take advantage of the frailties of both classes, separately and in conjunction. It is in these two classes that party-spirit runs riot, that the war-fever is most readily kindled, and that fanaticism and materialism—blind faith and still blinder infidelity—are in perpetual conflict. The classes that come in contact with the realities and responsibilities of existence, and that neither waste nor want, neither scoff nor cant, are those which we must seek to lure from their social hiding-places into the political arena.

IV. *The means by which the community declares its rational will.*

The rational will of the community may be declared either expressly, by legislation, or tacitly, by consuetude.

(a) *Legislation.*—Legislation may be effected either directly or indirectly. The former takes place when the autonomous community speaks in its own person; the latter when it speaks through its representatives.

The comparative advantages of the one system or the other are dependent entirely on the practical question,—which of the two, in the special circumstances of the case, will give the most perfect expression to the rational will? That, in great

communities, direct legislation is shut out by practical considerations is obvious.

(b) *Consuetude*.—Custom is the earliest form of legislation, and a form in which it may be quite as widely and permanently efficacious as in any other—witness the *Consolato del Mare*, the *Rolles of Oleron*, and the other maritime codes of the middle ages; and indeed the whole system of international law, both public and private, in so far as it does not rest upon treaty or convention.<sup>1</sup> But it would be an error to suppose that custom ceases to act when, or where, direct legislation comes into play. On the contrary, custom, as the expression of will which has been of some permanence, and on that account may be assumed to be rational, precedes, or ought to precede, every special enactment, just as it preceded enactments in general; and it modifies and repeals enactments and treaties to as great an extent as it dictates them. It is in this indirect action, indeed, on positive law, that consuetude assumes a legislative character in advanced communities, and between separate states.<sup>2</sup>

V. *The means by which the rational will of the community is applied to the special case may be either spontaneous or by jurisdiction.*

When the will of an autonomous community is unambiguously declared, either by legislation or by consuetude, it is

<sup>1</sup> See Freeman's *Growth of the English Constitution*, p. 105, &c., where he shows that our constitutional arrangements for the conduct of business in Parliament, and the like, rest mostly on unwritten law.

<sup>2</sup> In opposition to the English view, it has always been held that the ancient statute law of Scotland may be repealed by desuetude (*Stair*, B. 1. tit. 1. 25, note a, Brodie's ed.; *Ersk.* 1. tit. 1. 45, notes 12, 13, Ivory's ed.)

scarcely disputed except by lunatics and criminals, and in their cases it is enforced. But numerous cases occur in which it is not unambiguous, and these are met by jurisdiction. The relation between jurisdiction and legislation has been already explained.<sup>1</sup> As the means of ascertaining the general will is the least advanced, that of applying it is, in organized communities, the most advanced department of positive law.

VI. *The means by which the community enforces its rational will.*

*The community can govern itself only as an organism; and the more highly it is organized, the better will it enforce its own laws.*

The same principles which apply to the formation, the development, the ascertainment, and the expression of the rational will, apply to its enforcement. The community can be self-governing only on the same condition on which it is self-legislating—viz., its acceptance of the organic structure which springs from the natural disparities of individual power and wisdom. A state which proclaims an artificial equality of citizens loosens the bonds of obedience, enfeebles the voice of command, and turns its arms against its own life. It reduces its character, in short, from that of an army to that of a mob,—and how incapable of self-control the best of mobs are is a matter of common observation. Even as regards external defence, where there can be no separation of interests, the recent example of France and Germany ought to convince the most incredulous of the impotence of Chaos to struggle with Kosmos. Should Russia come into conflict either with Germany or England, the same phenome-

<sup>1</sup> *Ante*, p. 277 *et seq.*

non will probably be exhibited, in consequence of the absence or the impotence of the cultivated middle class. So closely, indeed, are the legislative and executive functions bound up together, that I believe there is no historical exception to the rule that the State which makes the best laws administers them best; and that every State ceases to be autarchous just in proportion as it ceases to be autonomous.

*Of the Army.*—The question of the relative advantages of citizen and standing armies is one which depends on special circumstances, and does not, therefore, admit of any general solution. This, however, may be said absolutely, that a citizen army will be trustworthy only where the social organization is very high, and where the national character is constitutionally dispassionate. It is plain, moreover, that if it is to execute the law, it can do so only on condition of its being entirely guided by, and mainly composed of, those who recognize it as their interest to obey the law. Order can be enforced only by those by whom it is accepted; and it is vain to hope that anarchical armies will protect order against anarchy, either in democratic or despotic states. On the other hand, however, it must not be forgotten that there is no better school of citizen discipline than the ranks of a disciplined army; and that, in states in which the national temperament warrants the experiment, ochlocratic evils may perhaps be mitigated by a judicious application of a means by which they cannot be suppressed. With this view it is obvious that the first requisite of citizen armies is that the educated classes should accept the burden of serving, not as officers only, but as privates. The spectacle of obedience



voluntarily rendered by their social superiors, combined with the necessity of rendering it themselves, will impress on the lower orders the first lessons of citizenship far more deeply than the discipline of the best mercenary army; and yet we have few anarchists amongst our own soldiers or sailors. In countries in which there is great disparity of wealth, it is by personal services as soldiers and politicians, on terms that are almost gratuitous, that a hereditary aristocracy can best justify its position; and the favour with which our great landowners and capitalists continue to be regarded, is no doubt owing to the exceptional zeal and efficiency with which these services are rendered by them in this country.

*The Police.*—The police is the branch of the Executive through which an organized State maintains internal order; and there seems no reason why its officers should not be regarded with the same consideration, and enjoy the same self-respect, as those of the department by means of which the State acts, when disorganized by rebellion, or when brought in contact with external force. I consequently rejoice at the tendency which the aristocratic class has recently exhibited to charge itself with the duties of the police as well as of the army. The police acts on a class that is beyond the reach either of the clergyman or of the schoolmaster; and the efficiency of the magistrate is wholly dependent on the efficiency of the police. The certainty of conviction is of more importance with a view to the prevention of crime than the severity of punishment; and inasmuch as a syllogism which has no major premiss can have no conclusion, there can be no conviction till there has been detection. The detection of

crime, moreover, calls for an amount of resource and ingenuity that confers on it the character of an intellectual calling and almost raises it to the level of a fine art. It consequently offers a worthier, more useful, and, as it appears to me, a more interesting field for the display of ingenuity and subtlety, than either playing whist at the clubs or making books on the race-course; and the same gifts which insure success in the one class of pursuits would be very likely to insure it in the other. An expert thief, too, is cunninger than any fox, and the pursuit of him might thus furnish, in some respects, no inadequate substitute for the chase. I have no belief in the superiority of scoundrels over gentlemen, even in cunning; and their inferiority in strength and courage to sporting squires need not be doubted. There are few kinds of crime that could not be prevented if honest, intelligent, and brave men would take the trouble to prevent them.

*Public Prosecution of Crime.*—The Romans classed criminal law with the *jus publicum*; and a State can scarcely be said to be self-governing which leaves the prosecution of crime in the hands of its private citizens. The very imperfect character of the system of public prosecution recently introduced into England,<sup>1</sup> when contrasted with that which Scotland and the Continental countries which followed the Roman law<sup>2</sup> have enjoyed for centuries, is a conspicuous example of the many evils which have resulted from the separation of the jurisprudence of England from that of the rest of the civilized world.

<sup>1</sup> 42 & 43 Vict., c. 22.

<sup>2</sup> Such information as we possess on the subject of public prosecution among the Romans will be found in the 4th edition of Lord Mackenzie's *Studies in Roman Law*, and in Mr Kirkpatrick's notes to pp. 386, 388, 392, &c.

BOOK IV.

OF THE OBJECTS OF POSITIVE LAW



## CHAPTER I.

OF THE ULTIMATE AND PROXIMATE OBJECTS OF POSITIVE LAW.

THE ultimate object of positive law is identical with the proximate object of natural law—viz., liberty.

But liberty being realizable only by means of order, order is the proximate object of positive law.

## CHAPTER II.

OF THE PRIMARY AND SECONDARY OBJECTS OF POSITIVE LAW.

(a) *Primary*.—Order, as we have just seen, is the proximate, or immediate object of positive law—the object in virtue of which it is distinguished from, and subordinated to, natural law, just as natural law was distinguished from, and subordinated to, ethics, in virtue of its narrower or proximate object—viz., liberty—when contrasted with the wider object of ethics—viz., human perfection. But on turning from natural law in its relation to ethics, and regarding it in itself, we found that it sought the realization of its object, not directly, but by



means which became to it, as it were, a secondary object, and that this means was order.

Now, in like manner, when we contemplate positive law no longer in its relations to natural law, but as a separate subject, having a special object of its own, we find that it seeks this object not directly, but by means, which means thus become its secondary object, or objects.

(b) *Secondary.*

The secondary objects of positive law are the specific rules for the realisation of order in the various relations in which human beings stand to each other in a particular community, or in which states stand to each other in the community of nations at a given time. The question which we have now to consider is, whether, or to what extent, these rules, though specific in their object, are general or universal in their action, and admit of exhaustive and permanent definition.

My readers are no doubt aware that, in working out systems of natural law, it has been usual to attempt to determine the general rules which nature, or expediency, is supposed to point out for the guidance of legislation, with reference to the various relations in which human beings necessarily stand to each other, whether as members of the family, the State, or what has been called the federal union of civilized nations. The cultivation of natural law in this positive direction, proceeds on the assumption that, as there are certain fixed principles of action which nature and reason indicate, so there are certain fixed, or necessarily recurring, circumstances and relations in which mankind will always be called upon to act; and that, by applying invariable principles to invariable

conditions, a body of invariable rules applicable to the life of the family and of society, both within and without the State, may be evolved. Hooker said truly, that "although no laws but positive are mutable, yet all are not mutable which are positive;" and in all the older writers, and in many of the moderns, we accordingly find what is called "a special part of natural law," in which is included the natural law of marriage, guardianship, succession, contracts, sale, and the like. Wolff's system, which Warnkönig has characterized as *ingens universi juris naturalis corpus*,<sup>1</sup> extended to nine vols. quarto; and we all know what a ponderous mass of ponderous matter Puffendorf accumulated. Now I am far from denying the truth of the assumption that there are invariable social relations, and to a limited extent other external circumstances, which are very little affected by changes of time and place; nor do I call in question the soundness of the rules which, on this assumption, have been evolved by many industrious, and by some gifted men. The relations of the family, to a very great extent, are fixed points. The idea of property, inseparable from the consciousness of subjective existence, involves proprietary relations; and from property result rights of gift, sale, and succession testate and intestate. Human intercourse can be carried on, and the necessities of mutual aid can be satisfied, only by means of mutual obligations, which involve multifarious relations dependent on good faith.

It is possible, in all these cases, by a study of comparative jurisprudence, and a careful application of the process of abstraction, to separate the necessary and invariable condi-

<sup>1</sup> *Delineatio*, p. 22.

tions of all society, or rather the general conditions of historical society, from the accidental and variable conditions of a particular society, and to resolve the questions arising out of the former in accordance with the principles of natural law, apart from the latter. It is possible, by bringing our normal humanity face to face with these invariable conditions, to discover the general line of conduct which nature indicates ; and thus a body of universal and unchangeable positive law, applicable to human society in so far as its conditions are universal and unchangeable, may be built up. But though I do not question the possibility of such a work, or its scientific legitimacy, I do exceedingly question its value, whether for practical or speculative purposes, when applied to positive law as a whole. And I do so for this reason : In so far as the relations thus evolved are invariable, they *must* recur in every branch of positive law. If they are the relations of the family, or of the citizens of the State to each other, they will recur in every municipal system. If they are the relations of the citizen to the sovereign power, they will recur in every system of public law, properly so called. If they are the relations of State to State, they will recur in international law. In each of these cases, then, we shall have an opportunity of studying them in their proper places, sometimes as jurists in the narrower sense of that term, sometimes as politicians, and sometimes as political economists. It is impossible that we should fail to encounter them, because, *ex hypothesi*, their recurrence is inevitable.

Nor can I see any advantage which their study, when isolated, presents over their study in connection with con-

ditions which may be accidental—that is to say, which may be confined to one or more states, and one or more periods of history or stages of development. The co-existence of accidental and ephemeral with necessary and permanent relations in real life is inevitable, because there must always be peculiarities belonging to every country, to every race, and to every stage of development. A system of positive law, then, which applied the principles of natural law only to the relations of human life which are invariable, could scarcely admit of any direct application to human affairs. It would be an ideal, the vagueness of which rendered it necessarily unrealizable. And as a guide to legislation for any actual living people, its utility would be very limited, even supposing it to be the result of a sufficiently wide induction to entitle it to the universal character to which it laid claim. Such a supposition, moreover, can scarcely be entertained. The construction of a system of the kind in question, though not, as I have said, a theoretical absurdity, I hold to be pretty nearly a practical impossibility. Is it not one of the first lessons which history teaches, that what is confidently believed to be necessary by one generation, the experience of the next shows to be accidental? There are certain relations, as I have said, to which this remark does not apply. But even these admittedly permanent relations are modified, in the forms which they assume, by the accidental conditions which accompany them, and which consequently determine the character of the positive laws by which they are governed. Children must be born helpless; and their support and education lie, in

the first instance, at the door of those who bring them into the world. To this general rule of conduct, the general rule that we should follow nature, and the promptings of that natural affection which the Greeks called *στοργή*, taken along with the invariable circumstances of birth and helplessness, no doubt guide us. But a general rule of this kind does little more, practically, than to refer us back to the necessities and instincts of our nature; and a knowledge of circumstances which are not invariable is requisite to help us to any rule of a more special kind. The kind of nourishment or education to be given, the length of time either is to be continued, whether and to what extent the duties of education and protection on the one hand, and obedience and docility on the other, ought to be enforced—all the details, in short, of the relation—can be learned only when the special circumstances of country, climate, stage of civilization, age, social rank of the parties, and other so-called accidents are considered. If these are not taken into account, natural law will be violated by the very provisions which were devised for carrying it out. Accordingly we find that, whenever it has been attempted to develop a specific system of natural law, it has invariably run into the municipal law of some particular country, or has borrowed accidental provisions from the municipal laws of several countries. If the writer was a Dutch civilian, his system was worked out in accordance with the legal definitions of the municipal systems of Holland and of Rome—a separation of the accidental from the necessary being scarcely even attempted. If he was an Englishman, the influence of the very



special conditions of English life, and the very peculiar insular system of positive law which had grown out of these conditions, was largely perceptible. In place of being a system universally applicable to mankind in all times and places, we had, in either case, a system for which the most that could be said was that, if it had gone still more into detail, it might have been applicable, for the time being, to Holland or to England. It would have been an English or a Dutch code, but it could never have been an universal code.

These considerations explain to us, I think, in no small degree, the disrepute into which the study of natural law ultimately fell, and may serve as a warning against the repetition of attempts which, even in able hands, were so barren of results. I entirely agree with Dugald Stewart when he says that "an abstract code of laws is a thing equally unphilosophical in design and useless in execution."<sup>1</sup> Whether the principles on which such systems profess to be constructed were adhered to or violated, the failure was almost equally inevitable. If they were adhered to—if no relations were considered except those which really were universal, and these were taken apart from the specialities which always accompany them in real life, nothing was produced except a string of the commonplaces of municipal law, so obvious as to render their repetition tedious and unprofitable in the last degree. If, on the other hand, they were departed from, and the inquiry carried out into specialities which might give it some value for a particular society at a particular time, then a positive error was committed, for

<sup>1</sup> *Collected Works*, vol. i. p. 187.

relations which were peculiar and accidental were represented as universal and permanent; and there was no small danger of the rules really applicable to one set of circumstances being thus imported into another to which they had no proper application. A limited ideal, in place of being a guide to truth, thus became a lure to error.

Influenced by these considerations, when I treated of the objects of natural law, I contented myself, for the most part, with presenting them in their widest generality, without reference, otherwise than for purposes of illustration, to the special relations in which they seek their realization. In all the relations in which human beings can be placed, liberty, and order as the condition of liberty, are the objects which nature assigns to the science of jurisprudence, and these objects she seeks as much and as constantly when the conditions which she offers are the most ephemeral and accidental, as when they are the most permanent and inevitable. This latter consideration, more especially, seems to me to furnish a practical reason of a very cogent kind, when we pass to the objects of positive law, for dealing with each department in its integrity, and refraining from any attempt to separate its provisions which are permanent from those which are variable. What is called the special part of natural law, is likewise the general part of positive law. The two subjects are not only intimately related—they are identical; as may be seen by comparing the first sentences of the chapters of any municipal treatise in which the general maxims relating to such subjects as marriage, guardianship, contracts, and the like, are set forth, with the chapters on the same subjects in

such works as those of Puffendorf or Rutherford, or even in the works of such modern writers as Ahrens, Röder, or Trendelenburg. Now the practical effect of exhibiting the rules which govern the general and permanent relations of humanity as a portion of the system of natural law, whilst the rules which govern the special and transitory relations of humanity are not exhibited in any direct connection with natural law at all, is to lead to the inference that these latter relations are governed either by no principles whatever, or by other principles than those of natural law. And such is the inference which is actually drawn by the vast majority of practical lawyers.<sup>1</sup> The general and unchangeable relations of human society, they say, are governed by the principles of natural law; the special and variable relations of society are governed by the principles of utility. But utility, as I have shown,<sup>2</sup> has no principles of its own apart from the principles of nature. Either it is an organ for the discovery of nature's laws, in which case it takes its place as one of the secondary sources of natural law; or else it is merely another name for the indications afforded by reason and experience, as to the special means best calculated, in special circumstances, to attain the objects of jurisprudence, in which case it takes its place amongst the sources of positive law. Now the *rôle* which reason and experience play is the same in principle, whether the rules which they suggest have reference to relations and conditions which are permanent, or to those which

<sup>1</sup> And not by lawyers only, but by philosophers, as may be seen from Ganz's preface to Hegel's *Philosophy of History*, Bohn's translation, p. xiv.

<sup>2</sup> *Ante*, p. 48 *et seq.*

are transitory. The object of the special rules is the very same as the object of the general rules—namely, to give free scope to the normal impulses of our nature, under the conditions in which it is brought in contact with the actual world.

I think I can illustrate this by a very simple example. The object of the law of marriage is the gratification of those impulses, physical, moral, intellectual, and religious, which lead to the cohabitation of persons of opposite sexes. Now, for the attainment of this object, expediency—that is to say, reason and experience—prescribe certain rules which are general, because they are applicable to circumstances which are permanent and universal; and other rules, which are special, because they are applicable to circumstances which are transitory, and very frequently local. As examples of the general rules, I may mention those which prescribe that the matrimonial contract shall be entered into only by persons capable of consent—a rule common to all contracts; only between persons who have attained to the age of puberty; only between one male and one female at the same time; which limits it to persons not related to each other within certain degrees, and the like. The special rules are those which define the patrimonial relations of the parties; their respective obligations to the offspring of the marriage; which prescribe the modes of celebration—that is to say, the manner in which the existence of the contract may be proved in accordance with the social arrangements of the country where it is alleged to have been entered into; &c. To the latter class of rules obviously belong those which prevail amongst

ourselves, to the effect that "habit and repute," "promise, *sub. cop.*," &c., prove marriage, whereas in England they are held to prove concubinage; and quite rightly, perhaps, in both countries, because the meaning of a fact not unfrequently depends on, and consequently varies with, the customs of different countries. Now the first class of rules is often incapable of receiving any definite interpretation without the aid of the second. The age of puberty, for example, varies according to climate; and a very absurd anomaly exists in our own law, from a rule specially adapted to the circumstances of southern climates having been regarded as a rule general to mankind. Intermarriage of cousins, again, might very properly be forbidden, either permanently or for a time, in a community which suffered specially from any form of hereditary disease: goitre and cretinism, scrofula, consumption, &c.; whereas in communities free from these specialities, it may be better left to the judgment of individuals and families. Even where rules are not dependent on physical peculiarities resulting from climate, or the like, it is often difficult to say whether the rules which are in reality of the most general application are altogether independent of the circumstances in which they generally come into operation. The rule which forbids polygamy is a rule of this class. Though not its only, one of its chief reasons unquestionably is the equality of the sexes in point of numbers. Now, it is possible to imagine circumstances in which, for a time, that reason should fail altogether. Would the other reasons in favour of this prohibition still exclude opposite reasons against it which might possibly arise? Suppose one



man and twenty women of full age, one of whom, who was his wife, was known to be barren, cast on an island, without hope of ever being restored to society—*quid juris?* Would the original command, to “be fruitful and multiply and replenish the earth,” modify the prohibition of polygamy, or justify divorce?

Now, if what we have been in the habit of regarding not only as general, but as universal rules, may lose their hold on nature when, by a change of conditions, they cease to minister to her objects; and if, *è converso*, rules which are exceptional at the highest, and when adopted generally, would violate her behests, are entitled to claim her temporary sanction the moment it can be shown that they really vindicate her objects, is it not obvious that the establishment of any permanent line of demarcation between these two classes of rules is a futile effort; and that if, whilst we connect the general rules of positive law with the principles of natural law, we separate the special rules of positive law from these principles, we tend to confirm the popular error by which the latter are held not only to be variable, but arbitrary? So greatly do I deprecate a result which, by relinquishing the necessary character, would destroy the sanctity of positive law, that I should regard the possibility of its occurrence, apart from all risk of speculative errors, as a sufficient ground for adhering to the bipartite division of the science of jurisprudence which we adopted in the outset, and maintaining, in its integrity, the distinction between natural and positive law.

But it may seem that a third choice remains. Why, it may be said, should we not have a complete positive system

of natural law, in the sense of a system which continuously takes cognizance of the special as well as the general relations of humanity, and this, not inadvertently, or from imperfection of execution, but consciously and expressly? Now, this idea—which seems to have been that which Puffendorf attempted to realize—resolves itself obviously into a proposal for perpetual and universal codification. Such a system, embracing, as it must do, public and private law, both municipal and international, even if satisfactorily executed for humanity for the time being, would be like the catalogue of a library to which not only were new books being added, but from which old books were being dismissed. It would stand to a permanent science of jurisprudence, absolutely considered, in about the same relation in which the catalogue of a bookseller's shop, where a rapid sale was going on, might be supposed to bear to the literature of the past, the present, and the future. Even with reference to a particular time—if we except the law of nations, which has no local limits—it would be requisite, in order to secure the universality of such a system, that it should be a collection of all the positive laws existing in the world,—a work, the irrationality and inutility of which render the impossibility of its performance a subject of rejoicing.

In so far as such a work could have any uses at all, they are attained by a branch of study much cultivated abroad under the name of comparative legislation,—a study which has been chiefly carried out in the directions of criminal and mercantile law, but which admits of general application.

If a general science of applied natural law is to be at-

tempted, then, there is no alternative but to draw the best line we can between relations and conditions of human life which are universal and permanent, and those which are local and transitory. It is not a course, as I have said, which we are bound to reject on absolute grounds, similar to those which forbid us to cut natural law through the middle by dividing rights and obligations into perfect and imperfect; but the practical reasons which I have stated appear to me sufficient to warrant us in breaking with the tradition by which it has been sanctioned. As I presented the objects of natural law—the ultimate objects of jurisprudence as a special science—without reference to the different character of the relations in which these objects are realized, so, in enumerating the objects of positive law—the proximate objects of jurisprudence—I shall abstain, in this work, from attempting to select any of them as more closely connected with natural law than the others. General and special, permanent and transitory, universal and local, I regard them as all, and all equally, seeking to give free scope to the normal impulses of humanity, within the spheres which they respectively embrace. Within each of these spheres it is for the practical legislator to bring his system, as nearly as possible, up to the character of a concrete realization of natural law; and it is for the scientific jurist who labours within the same sphere to indicate to him how this may best be effected. But, if anything serious is to be accomplished, there must be division of labour; the rule must be *quisquis in suam artem*; and such slender contributions as I may be in a condition to offer must be reserved for the subject of international law.

The objects of positive law may be classified with reference either to the spheres within which they seek their realization, or to the forms in which they are manifested.

From the former point of view two schemes of division have been proposed, either of which is capable of being rendered exhaustive.

I. The first is the Roman division—which still prevails generally in Europe—into public law and private law. As the Romans had formed no distinct conception of law without the State as a separate branch of science, these two divisions had reference to national law alone. Public law (*jus publicum*) was, *quod ad statum rei Romanæ spectat*. Private law (*jus privatum*) was, *quod ad singulorum utilitatem pertinet*.

Adhering to the principle of this scheme, and embracing under it the modern subject of international law, we should have—

(1.) *Public law within the State*, the *Staatsrecht* of the Germans,—what we often loosely and inaccurately call constitutional law.

The object of public law, in this sense, is to regulate the relations of the State to the citizen, and of the citizen to the State, political, personal, and economical.

(a) The first and most important branch of public law within the State, is that which has for its object to measure the autonomous power of the community, by ascertaining its rational will. It is this branch which determines the form of government,—which fixes the political relation in which the various classes of citizens shall stand to the whole organism—that is, to the State and to each other. Under this branch

fall also the relations of the different members of a federal government to the central power, and to each other—except in cases in which these relations are so loose as to entitle the various states to be regarded as independent communities,—and the relations of dependencies and colonies to the dominant State, or to the mother-country.

(b) The second branch of public law within the State, is that which regulates the individual relations of the citizens to the State. Under it fall the regulation of the public service, criminal law, poor-law, the government of the imbecile and insane, the rules of litigation, and ecclesiastical law.

(c) The third branch of public law within the State fixes and apportions taxation and other pecuniary burdens, general and local.

(2.) *Public law without the State*, or the *jus inter gentes*.

(a) Normal and stationary relations of states to each other.

(b) Abnormal and transitory relations of states to each other.

(3.) *Private law within the State*, or municipal law—*i.e.*, the relations of the citizen to the citizen.

(a) The domestic relations, or relations of life in the family, as exhibited by marriage, guardianship, &c., generally included under the law of *status*.

(b) The social relations, or relations of life in society, as exhibited in sale, partnership, letting and hiring, &c., generally included under the law of *contract*.

(4.) *Private law without the State*, or private international law—*i.e.*, the relations of the citizens of different states to each other. The object of this branch is to determine the occasions



on which justice requires that the municipal law of one State should be recognized by the municipal law of another.

II. The second scheme, which is more consistent with modern forms of thought, divides positive law into national and international; and these again into public and private, thus:—

1st, (a) National public law; and—

(b) National private law.

2d, (a) International public law; and—

(b) International private law.

III. In addition to this classification of the various branches of positive law, arising from the domains which they severally embrace, there is another, derived from the various forms in which the rational will—the source of all positive law—expresses itself. Seen from this point of view, positive law is—

(a) Common, or consuetudinary law (*jus non scriptum*).

(b) Statute law (*jus scriptum*).

(c) Codified law.

(d) Treaty law.

(e) The received, or politically orthodox, interpretation of revealed law.

## CHAPTER III.

## CONCLUSION.

*Of the reconciliation which the system of positive law, logically resulting from the principles of jurisprudence as determined by nature, tends to establish between the progressive and conservative schools of European politics.*

Knowing how widely I differ from revolutionary politicians in the results at which they arrive, both in this country and abroad, it may possibly seem surprising that I should not have differed from them more decidedly in the objects which they profess to seek, and that I should have permitted our discussions to lead us into the train of thought which gave rise to that historical watchword of disorder—*Liberté, égalité, fraternité!* The coincidence, however, has neither been involuntary nor insensible on my part; for, far from wishing to stigmatize this much-abused and justly-dreaded formula as necessarily the war-cry of anarchy, and, as such, the justification of despotism, I am ready to accept it, when urged in accordance with nature's teaching, as the symbol of order and progress. It is for this reason that I have not only assented to the doctrines which it inculcates severally, to the fullest extent of their possible realization, but that I venture, in conclusion, to recognize them in their ominous conjunction.

Liberty, we have seen, is the special object of our science; and inasmuch as the highest manifestations of liberty, so far

from conflicting with, involve and necessitate the highest manifestations of order, it is in the capacity of an apostle of order, and as coming, so to speak, from the opposite camp, that I have avowed myself a claimant for the maximum of liberty. "La politique radicale," says M. Jules Simon, "aspire à la pleine et entière possession de la liberté."<sup>1</sup> Had M. Jules Simon been *en pleine et entière possession de la science*, he might, with equal confidence, as it seems to me, have ascribed the same aspiration to the opposite school, in so far as that school has any aspiration at all beyond the realization of order for order's sake, and the impossible retention of the *status quo*. In so far as liberty is concerned, then, I am a radical as uncompromising as M. Jules Simon himself.

But liberty not only implies and necessitates, but absolutely identifies itself with equality in the only sense in which equality is anything else than a longing for the impossible, begotten of a sinful and ignoble "envying and grieving at the good of our neighbours." Here, then, is the second aspiration of "the Revolution" which, without being a revolutionist, I have adopted, in what I believe I have demonstrated to be the only sense in which it is not at once a folly and a crime.

Third and lastly, as regards fraternity. In repudiating the distinction between perfect and imperfect obligations, in asserting the identity in principle between justice and charity, and in proclaiming the entire reciprocity of rights and duties, I have recognized fraternity to the fullest extent to which it does not conflict with the other two principles of liberty and

<sup>1</sup> *La Politique Radicale*, p. 6.

equality—*i.e.*, in which its realization is not forbidden by its encroachment either on subjective or objective rights,—in which it would not be unjust even if it were not unreal. In identifying the principle of fraternity with that of guardianship, I have vindicated more specifically its relation to order, and restored their just importance to the long-forgotten duties of paternal authority and filial obedience. The principle of fraternity in this its wider and loftier conception—the *ergänzende Gemeinschaft* of the Germans, the *societatis appetitus* of the older writers—is the instrument of progress in which all our hopes must centre. Its proclamation was the secret of the marvellous success of Stoicism in Greece and Rome, and of Buddhism in the East; and though I am persuaded that at no period of history or stage of development was it, or any other fundamental law of human co-existence, wholly absent from human consciousness, I entirely concur with an eloquent writer of our own day in regarding its fuller recognition as the characteristic peculiarity of the Christian, as opposed to the heathen conception of the human relations.<sup>1</sup> To recognize our dependence on, and our obligations to, our fellow-beings, is indeed only another form of recognizing our dependence on God, and acknowledging the vanity and impiety of that spirit of self-sufficiency which we have indicated as the most prominent blot on heathen ethics.

Any separate discussion of the principle of fraternity, similar to that which we devoted to equality, would have been wholly superfluous in a work of which, from first to last, it has thus been the key-note; and one of the express objects

<sup>1</sup> *Ecce Homo*, pp. 175, 179.

of which has been to vindicate the pretensions of the positive or active, as opposed to those of the negative or passive school of jurisprudence. If guardianship (*Vormundschaft*), in its widest sense—embracing, that is to say, every expedient by which human beings, either by acting or abstaining from action, by commanding or obeying, by leading or following, by teaching or learning, can aid each other, whether in their individual or corporate capacity, in attaining the objects for which life was given them—be, as is maintained by the writers whose views in this respect I have adopted, the whole end and object of positive law, then positive law in all its branches, in all the manifestations of order or of liberty which it calls forth, is neither more nor less than a realization of the principle of fraternity.

So entirely, indeed, does each of the three principles in question involve the other two, that a system of jurisprudence which adopted fraternity or equality for its object—if logically deduced from the facts of nature—would arrive at results wholly identical with those of a system which set liberty before it as its goal.

Then as to the practical means, the legislative mechanism, by which these great objects may be attained. It does not belong to abstract science to investigate the positive provisions, either for the internal organization of separate states, or for their external organization as a family of nations; and I have, consequently, declined to enter on partial discussions of these and the other objects of positive law. But as a principle of nature, and, as such, common to legislation as a whole, I have, in what will be regarded as the liberal direc-



tion,<sup>1</sup> recognised—not on grounds of expediency, but on the ground of right—the inalienable sovereignty of the rational will; whilst, with a view to the ascertainment of that will and its enforcement when ascertained, without expressing a preference for any one of the forms of legislation or government by which these objects can be shown to be attainable, I have not hesitated to repudiate democracy when based on absolute equality, as the negation of government altogether, and as a form of existence in which it is *impossible* that the rational will of any community should be either ascertained or acted on.

Like many other words, democracy is a word to which several meanings have been attached, and I regret to observe the loose and indefinite manner in which it is beginning to be used by our own newspapers. It is a dangerous word, which no prudent or cautious politician ought to employ without qualification; for in the only sense in which it does not identify itself with, or at any rate constitute an element in,<sup>2</sup> some of the other, or rather, I ought to say, some of the possible, forms of government, it may—to parody Hegel's celebrated definition of law—be defined as “the reign of absolute equality realized.” It is in this sense that it hovers before the

<sup>1</sup> If politics should ever become a science, one of the greatest benefits will be that we shall get rid of party politics. Party politics are often defended as a necessity; but it is instructive to remark that it is only the politics of the party to which the politician belongs that he regards as necessary. The politics of the opposite party are always made a subject of reproach to it; its leaders are condemned as “party men,” and their measures as “party measures;” and very justly, for the most part, from the exaggerations which they exhibit. The only rational and honest “opposition” would be one which conviction might happen to raise against each measure in turn, by whomsoever proposed.

<sup>2</sup> Freeman's *Growth of the English Constitution*, p. 10 *et seq.*

imaginations of its Continental worshippers, and in this sense I have not hesitated to declare its realization to be forbidden by nature, and excluded from the objects of jurisprudence. Implying, in this sense, as we have seen, an entire reversal of natural law, democracy identifies itself with that condition of lawlessness or disorganization, that non-political condition which is known as anarchy; and we shall approach to it more and more nearly only as the State approaches its dissolution. Democracy, or absolute equality realized, is the antithesis of political life—it is political death—and a death, moreover, from which history, so far as I know, tells of no resurrection.

It is true that, in the State, as in the individual, death does not mean annihilation. To us annihilation is inconceivable. Whether or not it be possible for the Author of being to bring being to a close, is a question we shall never answer. But that such an occurrence is unthinkable to us, we know experimentally;<sup>1</sup> and, unless where thought is hedged in by rival impossibilities, and where a dictum of consciousness, in so far as we are concerned, settles the question for practical purposes in favour of one of them (as in the case of free-will),<sup>2</sup> we must accept the limits of thought as the measure of reality. What we cannot think of as possible we must assume to be impossible. There is, then, no annihilation. The State, like other entities, both spiritual and material, in its ultimate elements must continue to be. But that it shall continue to be, by no means implies that it shall continue to be, or return to being, as the same combination of the same individual atoms, if

<sup>1</sup> Hamilton, *Metaph.*, ii. 405.

<sup>2</sup> *Ib.*, Appendix, p. 542.

atoms there be. Under other conditions of existence, we must believe that the idea of the community, like the idea of each individual member of it, will ultimately receive that perfect realization which is and ever will be unattainable here. God will leave no idea finally unfulfilled. When we shall be capable of performing perfectly that "service which is perfect freedom," we shall be free, as He whom we serve is free. The perfect relation of separate existences will then be realized; but the Christian revelation expressly shuts out the hope that equality, in the sense in which fools contend for it on earth, shall exist even in Heaven.<sup>1</sup> Not in time only, but in eternity we must believe that one star will differ from another in glory.<sup>2</sup> But perfection, even in relation, does not belong to this world any more than perfection in the objects related; and "here," consequently, "we have no continuing city."<sup>3</sup> The continued existence of a state that has been subjected to the solvent of anarchy will be no longer an organic existence. Its elements, like those of our own mortal bodies, alone will remain. The spirit which animated it—its idea or conception of perfection in relation—will form a contribution to the political traditions of humanity. Its body will subsist in the inheritors of its physical life, in the children's children of those who were its citizens, though their blood should be as unrecognizable as the dust of their fathers. The spirit of Phœnicia, for example, lives in the mercantile law and colonial system of the modern world. The body of Phœnicia lives in the maritime populations of both sides of the Medi-

<sup>1</sup> Matt. v. 19, xi. 11; Luke vii. 28; 1 Cor. xv. 41; Ephes. i. 21, iii. 10, &c.

<sup>2</sup> 1 Cor. xv. 41.

<sup>3</sup> Heb. xiii. 14.

terranean, and probably constitutes the most energetic part of them. The spirit of Greece lives in the spiritual life of mankind. What has become of the material life of Greece we scarcely know. But this we know, that Phœnicia, and her daughter Carthage after her, as political organisms, are as dead as Hannibal; that Greece is as dead as Socrates; and that it is as unlikely that either of them will come to life again as that Hannibal or Socrates will rise from the dead.

It is true that the induction which seems to warrant our belief in political mortality, though greatly widened by the archaeological and philological researches of our own day, is so much narrower than that on which we assert the mortality of individuals, as scarcely to justify more than a probable conclusion. But it is equally consistent, so far as it goes; for, whether or not there be an autochthonous race, there is no more an autochthonous state than there is an autochthonous man.

Admitting, then, the mortality of the body politic and the impossibility of its resuscitation, and recognizing democracy as we have here defined it, as a violation of the law of its life, and consequently as a process by which, if permitted to act, its dissolution will be inevitably accomplished, the question still remains, Is this process, the action of this political solvent, inevitable? If the cycle must be accomplished, is this necessarily its final stage and its new point of departure? If the State must die, must it necessarily die prematurely of this terrible disease? Must it, in the fulness of material well-being and progress, be torn in pieces by such hideous paroxysms of sin and suffering? or may not its physical life be

indefinitely prolonged till, like the healthy individual body, it gently and almost imperceptibly gives place to younger and more vigorous organisms through which its spiritual development is continued ?

It is at this point that my political creed separates itself from the democratic-fatalism which cast so deep a shadow over the life, and finally clouded the intellect of my dear and gifted friend M. Prévost-Paradol, and which then<sup>1</sup> depressed so many of the best and bravest of his countrymen. That a physician in the midst of an epidemic which sets at defiance the utmost resources of the healing art, should feel as if all men were not only doomed to die, but to die of that particular plague, till at last he comes almost to persuade himself that it is no plague at all, but the natural termination to human life, is a perfectly

<sup>1</sup> With the substitution of the past for the present tense, I gladly retain these concluding sentences as a memento of the sentiments of 1872. Had M. Prévost-Paradol consented to live, the eight or nine years of tranquillity which his much-loved country has since enjoyed, would have renewed his spirit and refreshed his heart. But they have brought, I fear, no adequate constitutional guarantee that the spectre of *égalité* may not again stride over the fair fields of France, when the external conditions of her present existence are changed. The process of decentralisation, to which the more enlightened statesmen of France have always looked for the indirect action of those moral and intellectual forces which were to counteract the theoretical errors of their political system, has scarcely commenced. It is generally supposed that the temper of London is less volatile than that of Paris. Yet in the confidence with which London opinion recently asserted itself, in the extent to which it proved to be at variance with the general opinion of this country, and in the facility with which it turned round, we have had a memorable example of the tendency of great and crowded centres of life to give way to exceptional and ephemeral emotions. Mental are as contagious as physical epidemics, and no form of mental epidemic is more contagious than political passion. So long as the political life of France is concentrated in Paris, it is to be feared that periodical outbreaks of Imperialistic and Socialistic fever are inevitable, and that the Franco-German war of 1870 may not be the last occasion on which France will act in haste and repent at leisure.



intelligible state of feeling. And such was very much M. Prévost-Paradol's case. But does it follow that his belief commends itself to other men, or that it would have commended itself to him in happier circumstances? It may be that disease is as inevitable as death, and most diseases in their ultimate form will produce death, but there are very few diseases which, in their earlier stages, are not more or less under human control, and none certainly which a rational being ought, *à priori*, to accept as his doom. It is true that in accepting democratic-fatalism as his ultimate political creed, M. Prévost-Paradol's patriotism lost nothing of its fiery zeal. To the last he wore himself out in contending against what he regarded as inevitable, in attempting to reconcile what he knew to be irreconcilable. Anarchy or despotism were the horns of his acknowledged dilemma; and that foreign conquest must be the result of either alternative was a subject on which he cherished no delusions; for from delusions of all kinds the intense honesty of his nature recoiled with a furious antipathy which I scarcely ever saw in the nature of any other man. And yet his position was essentially a false one; for the honesty with which he accepted his premises shut him out from the foregone conclusion which his patriotism imposed on him, and he worked on a problem confessedly insoluble. "On ne saurait donc trop le redire : la Révolution française a fondé une société, elle cherche encore son gouvernement."<sup>1</sup> These, and such as these, were his words. Now, to seek a government for a democratic society, on his own showing, was like seeking a doctor for a dead man. If the doctor is to be of

<sup>1</sup> *La France Nouvelle*, p. 296.

any use, we must try to keep a spark of life in the man till the doctor comes to him; and before M. Prévost-Paradol went to seek for a government for France, he was bound to show in the society of France some slumbering embers of reverence, order, and obedience, which had survived the Revolution, on which a government could be based—to prove, in fact, that, far as she had gone in that fatal direction, France was not yet finally and hopelessly democratic. It is in this respect that M. Rénan, as it seems to me, has become wiser than his friend, and wiser in his later than in his earlier writings, from the terrible teaching of events.<sup>1</sup>

A state may no doubt play with a false political theory, as a man may play with a guillotine. It is a dangerous sport, and one in which I grieve to think that even my own country, with so few safeguards, should have indulged so long. But sport, however objectionable, is one thing, and reality is another. So long as a madman's head is on his shoulders, the doctor, with his strait-jacket, may do something, if not to cure him, at least to keep him in life. But once his head is off, it is the gravedigger that must be sent for; and the gravedigger, in the guise of the foreign conqueror, will come

<sup>1</sup> "Il y a cercle vicieux," he says, "à rêver qu'on peut réformer les erreurs d'une opinion inconvertissable en prenant son seul point d'appui dans l'opinion" (*La Réforme*, p. 26); and farther on he asks, "Quel est pour la France ce défaut favori, dont il import avant tout qu'elle se corrige? C'est le goût de la démocratie superficielle. La démocratie fait notre faiblesse militaire et politique; elle fait notre ignorance, notre sotte vanité . . . Corrigeons-nous de la démocratie" (pp. 64, 65). To M. Rénan it had at last become plain that the option for France lies between democracy and life; but the earlier essays which he republished show that his recognition of this fact came many months after M. Prévost-Paradol's death.

sooner or later to the dead state, and hide, by the imposition of external will, the ghastly process of political decomposition.

Now, though it may be impossible to reverse the law of political mortality, or to bring states to life again after they are dead, it appears to me that by accepting as fixed points the facts of nature in so far as they are known, those states which still live and breathe through the various organs of the body politic may do much to promote their indefinite longevity. If reason is to have any influence in human affairs at all, the "search for a government," or, taking the matter from our point of view, the gradual development of the government which is rooted in their past, ought not for such states to be a hopeless task.

For its accomplishment two requisites—the one social and the other political—seem alone to result from our inquiries.

1. The social requisite is: The simultaneous abandonment of the claim for exclusiveness on the one hand, and equality on the other; and the fullest and freest acceptance of the duties of mutual aid in the three directions pointed out by the natural relations of individuals—those, viz., of parents, children, and brethren.

2. The political requisite—which, if *following* on the social one, it would probably not be difficult to attain—is: The discovery, or development, of a self-adjusting representative system, as universal as is consistent with order at the stage of progress which the community has reached as an autonomous society, and so graduated as to correspond to the substratum of fact in relation to which alone equality can be justly claimed, or permanently asserted.

There is a last consideration on which my rejection of democratic-fatalism, in favour of a belief in the ultimate prevalence of political reason, is founded, and which our unlimited but not indiscriminating acceptance of the three famous doctrines popularly ascribed to the Revolution has enforced,—I mean the fundamental rectitude of human nature. In the persistent advocacy and partial triumph of these doctrines, we have had a memorable confirmation of the fact that the great human heart, even when it goes fatally astray, is not wholly in error. More than ever, indeed, it has been proved to us that the vulgar intelligence is incapable of distinction, impatient of analysis, one-sided, and prone to exaggeration. More clearly than ever we have seen that the vulgar conscience, groping in the dark without light, “and staggering like a drunken man,”<sup>1</sup> is readily led captive by vain hopes and still vainer fears. Where the political organization of a community unhappily is such that the purifying and moderating influences of its better spirits are excluded or neutralized, its best impulses frequently serve only to mislead it. But its errors, even then, however fatal they may prove to it as a separate state,<sup>2</sup> are only distortions of the truth, and of that side of the truth, moreover, which for the time being had fallen out of sight. The maxim, “follow nature,” which our earlier investigations seemed to warrant, and which the history of opinion sanc-

<sup>1</sup> Job. xii. 25.

<sup>2</sup> “La France,” says M. Rénan, “expie aujourd’hui la Révolution ; elle en recueillera peut-être un jour les fruits dans le souvenir reconnaissant des peuples émancipés.”—*La Réforme*, pref. xiii. Would that the prospect may prove as accurate as the retrospect !

tioned, derives additional confirmation from the fundamental righteousness which, amidst all their aberrations, has characterized popular aspirations during the last eighty or a hundred years. Often as she has been betrayed by her apostles, liberty has generally been victorious over despotism, and promises to maintain with anarchy a more than equal fight. The reflection is a consolatory one at all times, and from all points of view, for in it rests our only rational hope, if not of the permanence of individual states, at least of the political progress of humanity. Ultimately nature, whether right or wrong, will certainly prevail, for of her, with far greater truth than Hobbes said of his *Leviathan*, we may say, *non est potestas super terram quæ comparctur ei*. But if nature, not uprooted, but purified, potentiated, and explained to herself, be not a trustworthy guide—if the *vox populi*, in the sense of the whole voice of a whole people organically uttered, be not at bottom also the *Vox Dei*, then there are but these alternatives: either we must take refuge in dualism and content ourselves with the prospect of perpetual war; or else give way to pessimism, in which case the future of God's world, being abandoned to Satan, even war will become a dream.





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